

The
Current Index
of
Indian Cases
1908

A stylized handwritten signature in black ink, appearing to read 'Sms.' with a flourish.

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WHOSE APPRECIATION AND ENCOURAGEMENT

IN CONNECTION WITH THIS COMPILATION

THE COMPILER DESIRES VERY GRATEFULLY TO ACKNOWLEDGE

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ABBREVIATIONS EXPLAINED.

REPORTS.

A.	Indian Law Reports, Allahabad Series.*
A.L.J.	..	..	..	..	Allahabad Law Journal.*
A.W.N.	..	..	..	..	Allahabad Weekly Notes.*
B.	..	..	..	..	Indian Law Reports, Bombay Series.*
B.H.C.	..	..	..	..	Bombay High Court Reports.
B.L.R.	..	..	..	..	Bengal Law Reports.
Bom. L.R.	..	..	..	..	Bombay Law Reporter.*
Bur. L.R.	..	..	..	..	Burma Law Reports.
C.	..	..	..	..	Indian Law Reports, Calcutta Series
C.L.J.	..	..	..	..	Calcutta Law Journal.*
C.L.R.	..	..	..	..	Calcutta Law Reports.
C.W.N.	..	..	..	..	Calcutta Weekly Notes.*
C.P.L.R.	..	..	..	..	Central Provinces Law Reports.
Cr. L.J.	..	..	..	..	Criminal Law Journal of India.*
I.A.	..	..	..	..	Law Reports, Indian Appeals.*
L.B.R.*	..	..	..	..	Lower Burma Rulings.*
M.	..	..	..	..	Indian Law Reports, Madras Series.
M.H.C.	..	..	..	..	Madras High Court Reports.
M.L.J.	..	..	..	..	Madras Law Journal.*
M.L.T.	..	..	..	..	Madras Law Times.*
M.I.A.	..	..	..	..	Moore's Indian Appeals.
N.L.R.	..	..	..	..	Nagpur Law Reports.*
N.W.P.H.C.	..	..	..	..	North West Provinces High Court Reports.
O.C.	..	..	..	..	Oudh Cases.*
P.R.	..	..	..	..	Punjab Record.*
P.L.R.	..	..	..	..	Punjab Law Reporter.*
P.W.R.	..	..	..	..	Punjab Weekly Reporter.
S.L.R.	..	..	..	..	Sind Law Reporter.
T.L.R.	..	..	..	..	Travancore Law Reports.*
U.B.R.	..	..	..	..	Upper Burma Rulings.*
W.R.	..	..	..	..	Sutherland's Weekly Reporter.

OTHER ABBREVIATIONS

Appl.	..	..	..	..	Applied
Appr.	..	..	..	..	Approved
D. or Distd	..	..	..	..	Distinguished.
Disc	..	..	..	..	Discussed
Diss	..	..	..	..	Dissented from
Exp	..	..	..	..	Explained
F.	..	..	..	..	Followed.
(F.B.)	..	..	..	..	Full Bench.
Obs.	..	..	..	..	Observed on
(P.C.)	..	..	..	..	Privy Council
R. or Reqd to	..	..	..	..	Referred to
(S.B.)	..	..	..	..	Special Bench.

(N.B.)—(1) This publication embodies Cases (Civil and Criminal) from the Reports marked above with asterisks

(2) In the Punjab Record and the Punjab Law Reporter, the Cases are known by their numbers and not by the pages where they are printed; (e.g.) 4 P.R. 1906 would mean Case No. 4, in the Punjab Record of 1906. The same explanation applies to the Punjab Law Reporter also. It has also to be remarked that the Punjab Record and the Punjab Law Reporter have been divided into two sections, Civil and Criminal.

(3) For Cases from Reports other than those published in India, the volumes and pages are printed exactly in the manner they are to be found in the original cases wherein they are referred to.

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* This is wrongly printed as 35 C = 924 in the body of the book.

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47	880	406	265	43	571
49	330	408	121	45	123
51	694	414	336	48	217
54	118	415	173	52	838
60	339	419	944	57	333
62	113	425	950	62	290
64	628	431	685	63	740
66	31	439	779	67	571
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FINAL PART.

SECTION II --(CIVIL CASES).

Abandonment.

- (1) *Absentee—Adverse possession of maliki and shamilat land—Right of defendant to claim compensation*

The plaintiffs sued the defendant, a near agnatic relation, for recovery of land of which their father and they themselves were recorded as proprietors in the settlements of 1868 and 1892. In the settlement of 1868, the plaintiffs' fathers were recorded as minors, and the defendant was entered as in possession on their behalf. Pleas of adverse possession and abandonment were set up. The land comprised both *maliki* and *shamilat* lands.

Held (1) that there was no adverse possession under the circumstances of the case in the absence of any proof of an open assertion of hostile title or any overt act or conduct denying the title of the plaintiffs. On the contrary, the facts, that the plaintiffs' names were allowed to be entered in the settlements records, with the knowledge of the defendant and that the defendant in 1868 was entered as in possession on behalf of the plaintiffs' fathers who were recorded as minors, negative any such plea.

(2) That the plaintiffs did not lose their right by abandonment. Remaining out of possession for very many years and not evincing any concern in the land or receiving any of the profits do not *per se* suffice to prove abandonment, especially where (as here) the person who has all along been in possession is a very near agnatic relation and at the outset took possession on behalf of plaintiffs' fathers, then minors (a).

Abandonment (Continued)

(3) That, under the circumstances, when the defendant had, from 1868 to date of suit, been in possession of the land and enjoying its profits, he must be taken to have fully compensated himself thereby for any expense to which he may possibly have been put, and, therefore, he may not be entitled to claim any compensation in the case.

(4) Cases of abandonment and absentees should be decided upon their own facts. (b). **Hakim v Hashim**, 97 P. W. R. 1908.

RATTIGAN, J.

References —(a) 18 P. R. 1886, 62 P. R. 1890, 84 P. R. 1888 and 43 P. R. 1901, P. and (b) 9 P. R. 1890, P.

(2) *Common holding—Effect of possession of one co-sharer—When and whether long possession and enjoyment will constitute adverse possession—Effect of absentee of common holding leaving it in possession and enjoyment of co-sharer—Whether abandonment arises.*

Where a piece of land is part of a common holding, and the owner goes away and becomes an absentee leaving the land in the possession of co-sharer relatives, he does not legally give up possession, because the possession of one co-sharer is the possession of all. A co-sharer cannot claim a title, by adverse possession, to such land, however long he may have possessed and enjoyed it, unless he can show, as against the absentee co-sharer, the most unequivocal assertion of, and exercise of, such adverse possession as against such co-sharer, or relinquishment of the land by him.

Abandonment—(Concluded).

Where an absentee of a common holding left the land, when he originally went away, in the possession of co-sharer relatives, successfully asserted his right to succeed to lands left by a relative in the village, promptly objected when an attempt was made by the co-sharer to get the absentee's name struck out of the revenue records, and it was noted in the settlement records that his share would be restored to him whenever he returned to the village, and, in a later settlement, the absentee was shown as owner of a larger share of the holding than in the previous settlements, *held* that he had not relinquished his holding and that he could resume his land, even when he returned after a prolonged absence, to his village.

Relinquishment must be judged of on the facts of each particular case and having regard, as one important factor, to the circumstance that the property has or has not been left in the hands of a co-sharer in the beginning.
Ram Chand v Kirpa Ram, 120 P. R. 1904.

ROBERTSON and CHILVIS, JJ

References—118 P. R. 1889, 79 P. R. 1893, 141 P. R. 1883, 121 P. R. 1884, 78 P. R. 1875, '38 P. R. 1878, 118 P. R. 1893 and F. A. 366 of 1905, 936 of 1904 and 1007 of 1899 unpublished, &c.

(3)—, question of intention—Legal abandonment, how effected—Voluntary—See ACT VIII of 1885 (TENANCY—BENGAL), No. 16, 7 C. L. J. 72.

(1) Deed of, executed in reliance upon the generosity of party benefitted—No consideration—See MAHOMEDAN LAW (SUCCESSION), No. 1, 4 A. L. J. 792.

(5)—of homestead land by tenant—Transfer to another—No payment of rent—Whether land lord justified in regarding conduct as amounting to implied surrender—Right of landlord to take direct possession of land—See LANDLORD AND TENANT, No. 5, 7 C. L. J. 399.

(6) Long delay in suing no abandonment in law—Long unexplained delay, relevant in certain cases—See EVIDENCE ACT, No. 24, 129 P. W. R. 1908.

Abatement.

(1)—of appeal—Death of *pro forma* defendant, whether abates the appeal of other defendants who could have maintained their appeals independently—See ACT II of 1901 (AGRA TENANCY), No. 7 1 A. L. J. 809.

Abatement—(Concluded).

(2)—of suit—Suit for redemption—Plaintiff suing as also heir—Death of plaintiff—See MORTGAGE (REDEMPTION), No. 2, 4 A. L. J. 783.

(3)—of appeal—Death of appellant—Duty of the heirs—All heirs not brought upon the record—Effect. See CIV. PROC. CODE, No. 226, 5 A. L. J. 62.

(4)—of suit—Suit for dissolution of partnership—Necessary parties—Death of a party—Substitution of heirs not made in time—Effect. See PARTNERSHIP, No. 3, 7 C. L. J. 266.

Abkari Act.

See ACT V of 1878 (BOMBAY)

Absentees.

Cases of abandonment and of—Should be decided upon their own facts—See ABANDONMENT, No. 1, 97 P. W. R. 1908.

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(1) Stipulation in the lease amounting to—See ACT VIII of 1885 (BENGAL TENANCY), No. 1, 12 C. W. N. 175.

(2) *The bata usual, Dastur, Haqatana, Sonari, Chanda Salami and percentage* are abwabs—See CIV. PROC. CODE, No. 14, 7 C. L. J. 251.

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Assent not signed on bills but only upon copies of bills—Material requirement of law omitted—No valid acceptance—See ACT XXVI of 1881 (NEGOTIABLE INSTRUMENTS), No. 1, 10 P. W. R. 268.

Acceptor.

—of bill of exchange—Liability of acceptor at maturity of bills—Presentment not necessary—See ACT XXVI of 1881 (NEGOTIABLE INSTRUMENTS), No. 1 10 P. W. R. 268.

Accounts

(1) *Suit for—Principal and agent—Movable property—It includes money—Limitation—Limitation Act (XV of 1877), Sch. II, Arts. 89, 116 and 130 Contract of service in writing and registered.*

Art. 89 of Sch. II of the Limitation Act expressly applies to the case of a principal suing his agent for an account, whilst Art. 116 applies to a suit for "compensation for the breach of a contract in writing registered." To ascertain which article of the schedule applies it is necessary to see what is the relief which the plaintiff claims.

Accounts—(Continued).

The expression "movable property" in art. 89 of Sch II of the Limitation Act includes money (a).

A suit, not merely for an account, but also to enforce in the plaintiff's favour the charge created to secure the moneys which might be found due from the agent to his principal on his accounts falls within Art 132 of the Second Schedule to the Limitation Act, and the period of limitation is twelve years from the time when the money sued for becomes due. **Hafezuddin Manual v Jadu Nath Saha**, 7 C L J. 279—12 C. W. N. 820=35 C. 298.

MACLEAN, C. J., & COX, J.

References—(a) 27 A 27 8 C W N 113, 1 C. L. J. 117 & 232, R.

(2) *Settlement of account—No fraud or undue influence used in settlement—Promissory note for the amount found due—Re opening of accounts, not allowed*

Where two persons have mutual dealings and accounts, and one of them, of his own free will and accord, and without any fraud practised or undue influence exerted by the other, waives his right to an examination of the accounts for the purpose of ascertaining the balance due and agrees to treat a gross sum as due from him and executes a promissory note for the amount the promissory note must be treated either as the result of a settled account or as a settlement by compromise, and in either case it cannot be re-opened. **Magniram Khupchand v. Lakshminarayan Rampratab**, 10 Bom L. R. 281=32 B. 35.

CHANDAVARKAR and KNIGHT, JJ

*Reference—*5 M. L. A. 395 P

(3) *Settlement of accounts, and execution of receipt for amount found due—Whether constitutes a bond—Cause of action—Rate of interest—Reg. I of 1910*

Plaintiffs advanced moneys to the defendants at 15% interest. On a certain day the accounts were settled and a sum of money was found due to the plaintiffs for balance of principal and interest on that day, and the defendants made the following entry in the plaintiffs' account book, viz., "we shall repay the sum we borrow with interest at 15%," and this entry was followed by an entry of the amount then found due.

Accounts—(Concluded).

In a suit on the receipt, it was held that the receipt was a bond superseding the prior cause of action and creating a new cause of action for the amount mentioned therein from the date of such receipt. **Sankara Aiyar v. Subramania Dikshadar**, 23 T. L. R. 17.

T. SADASIVA Aiyar, C. J., MUTTUNAYAGAM, J., and GOVINDA PILLAY, J. (*dissenting*).

*References—*20 T. L. R. 212, 33 C. 1047, 23 M. 24, A. S. Nos. 392 and 402 of 1080, 8 B. 194, 6 B. 683, 8 B. 405, 4 A. 330, A. S. No. 210 of 1080, R

(3-a) *Maintainability of suit for—Receiver appointing Tahsildar—Agent and sub-agent—Indian Contract Act (IV of 1872), Ss. 191 & 192.*

A suit for accounts is not maintainable by the owner against a Tahsildar, who was appointed by a receiver to his estate

The tahsildar (defendant) is a sub agent under the receiver, who may be regarded as the agent of the principal (plaintiff), and, as sub-agent, he is liable to render accounts to the receiver, and not to the principal. **Jotindra Narain Acharja Chowdhury v. Rajendra Kisore Das**, 8 C. L. J. 111=12 C. W. N. 1035.

BREIT and COX, JJ

(1) Fresh account to be taken in redemption suit though account already taken in foreclosure suit See MORTGAGE (REDEMPTION), No. 23, 4 N. L. R. 168.

Accretion

(1) Commissioner refusing to make settlement of khas mahal land with plaintiff who claimed settlement of it as alluvia accretion to his jote—Suit to set aside order governed, not by Art 11, but by Art. 45, Limitation Act. See LIMITATION ACT, No. 56, 12 C.W.N. 910

(2) Whether non-occupancy tenant can hold newly formed land as accretion. See REG. XI of 1825 (BENGAL ALLUVION AND DIVISION) Nos. 1 and 2, 8 C. L. J. 537 and 538.

(3) Terms of holding accreted land. See REG. XI of 1825 (BENGAL ALLUVION AND DIVISION), No. 3, 8 C. J. 541.

Accused person.

Whether action for libel or slander will lie against accused persons defending themselves—Whether and when reply to notices of action are privileged—Whether such action will lie against judges, counsel, witnesses, or parties for words

Accused person—(Concluded).

written or spoken during proceeding before Court or legal tribunal. See *TORT*, No. 4, 18 M. L. J. 353.

Acknowledgment

(1) Agreement to pay a barred debt—Intention to pay as deductible from language of—not sufficient—Express promise necessary to maintain suit on agreement—Effect of regarding acknowledgment equivalent to a promise to pay—See *LIMITATION ACT*, No. 21, 5 A. L. J. 274.

(2) Essentials of a valid acknowledgment—Acknowledgment contained in written statement—See *LIMITATION ACT*, No. 22, 10 Bom. L. R. 374.

(3) Essentials of a valid acknowledgment—Limitation—See *MORTGAGE (REDEMPTION)*, No. 14, 23 T. L. R. 36.

(4) Mortgagor narrating relationship of mortgagor and mortgagee—Mortgagee admitting its correctness by signature—Effect of the writing—See *LIMITATION ACT*, No. 23, 10 Bom. L. R. 385.

(5) Acknowledgment evidencing a fresh contract—The words "and shall be paid" contained in an acknowledgment, effect of—See *STAMP ACT*, No. 6, 11 O. C. 152.

(6) Power of guardian to acknowledge debt due from minor so as to give a fresh start to the computation of limitation. See *LIMITATION ACT*, No. 24, 5 A. L. J. 375.

(7)—by mortgagee of mortgagor's right to redeem to be good for saving limitation need not be addressed specifically to mortgagor. See *LIMITATION ACT*, No. 25, A. W. N. (1908), 226.

(8) Defendant signing plaintiff's accounts—Defendant acting as though signature referred to the whole amount—Effect—See *LIMITATION ACT*, No. 64, 4 M. L. T. 77.

(9) Part payment—Endorsement not in debtor's hand, but only signed by him—Whether bare signature of debtor will save limitation, where he can write—S. 20, Limitation Act. See *LIMITATION ACT*, No. 29, 35 C. 813.

(10) Balance struck and admitted due—Acknowledgment of liability—No promise to pay forming fresh cause of action. See *LIMITATION ACT*, No. 27, 119 P. R. 1903.

Acquiescence.

—whether question of fact or of law—Whether good ground for revocation. See *ACT XVIII OF 1894 (PUNJAB COURTS) AS AMENDED BY ACT XXV OF 1899*, No. 9, 31 P. W. R. 1908.

Acts.

- 1.—IMPERIAL ACTS.
- 2.—BENGAL ACTS.
- 3.—BOMBAY ACTS.
- 4.—BURMA ACTS.
- 5.—CENTRAL PROVINCES ACTS.
- 6.—MADRAS ACTS.
- 7.—NORTH WEST PROVINCES ACTS.
- 8.—ODISH ACTS.
- 9.—PUNJAB ACTS.

1—Imperial Acts.

Act XXXII of 1839 (Interest).

(1) *Hindu Law as to payment of interest, applicability of—*

Where there was no agreement to pay interest and no demand in writing to bring a case within the provisions of the Interest Act, the Hindu Law was held not to be binding in such matters as the payment of interest (a) **Subramania Aiyer v S. A. Subramania Aiyer**, 3 M. L. T. 278—18 M. L. J. 245—31 M. 250.

WALLIS and SANKARAN NAIR, JJ.

References.—(a) 6 M. H. C. R. 400, 20 M. 481, 31 B. 354, R.

(2) *Plaintiff not a Hindu—Absence of mercantile usage—No written instrument—No demand in writing—Right to interest—S. 73, Contract Act*

Where the plaintiff is not a Hindu, and there is no agreement for interest, interest can only be recovered (a) by mercantile usage, or (b) under the Interest Act XXXII of 1839. If it is claimed under the Interest Act, there must be (1) a sum certain payable at a certain time by a written instrument, or, (2) a demand of payment in writing, giving notice that interest will be claimed.

Where neither of these conditions are fulfilled, the plaintiff cannot claim damages under S. 73 of the Contract Act, as that section is not intended to override the provisions of the Interest Act. **Haji Muso, son of Haji Jan Mahomed v. Haji Nur Mahomed, son of Abdul Kadir**, 1 S. L. R. 179.

PRAET and HAYWARD, JJ.

References.—9 Bom. L. R. 439, 26 C. 955; (1893) L. R. App. Cases 434 and 20 M. 481, R.

Act XIX of 1841 (Protection of property in cases of succession),

(1) *Ss 1, 3 and 4—Illegal possession of a deceased person's estate without any claim,—Procedure under S. 3 of the Act on complaint regarding—Failure of Court to follow such procedure, effect of.*

I.—Imperial Acts.—(Continued).**Act XIX of 1841 (Protection of property in cases of succession).—(Concluded).**

To put the procedure provided by the above Act in motion, the title and *lona fides* of the applicant must be clear, and it must also be manifest that the party complained against had no lawful title to possession, and that, if the applicant were referred to a regular suit, he would be a serious sufferer. The mere fact, however, that the Court, before issuing the citation under S. 4, omitted to follow such procedure and to satisfy itself, whether the party in possession had no title, would not so operate as to prevent a rectification of such procedure and to bar the Court from arriving, on the evidence, at a conclusion that the person in possession ought to be left undisturbed. **Rajji v. Lal Chand**, 138 P. R. 1906=116 P.L.R. 1908.

REID, C. J.

References — 6 W. R. (Mts.), 53 and 7 P. R. 1901, R.

(2) S. 3—See No. 1 *supra*.

(3) S. 1—See No. 1, *supra*.

Act XVIII of 1850 (Protection of Judicial Officers).

(1) Cause of action—Claim for damages for improper search by a Judicial Officer as such—No cause of action against the Secretary of State for India—addition in substitution of Defendant—Act XVIII of 1850 — Act V of 1861, S. 13—Civ. Pro. Code of 1882, S. 32—Crim. Pro. Code, S. 165.

Held, that, where a Judicial Officer acting in his official capacity is protected by Act XVIII of 1850, in respects of acts done by him with jurisdiction or done under the *lona fide* belief that he has jurisdiction, the protection thus afforded to him equally extends to his master, the Secretary of State for India in Council.

Held, also, that, where a cause of action is shown to exist against the defendant originally impleaded, but, on the allegations made in the plaint, there appears also another person concerned in it, the Court should at once make that person, under S. 32 of the Civ. Pro. Code, a co-defendant without raising an issue on that point, and should not first rule out the claim against the original defendant, and then hold that the Court could not allow the impleading of the other person, on the ground that it would be a substitution and not an addition of a defendant.

I.—Imperial Acts.—(Continued).**Act XVIII of 1850 (Protection of Judicial Officers).—(Concluded).**

Held, further, that, where a judicial Officer, instead of issuing a search warrant under S. 96 of the Cr. P. C., proceeds under S. 165, the mistake is immaterial and he cannot be said to have acted without jurisdiction. In cognizable cases, a Police Officer has the same power of search under S. 165, Crim. Pro. Code as a Judicial Officer has under S. 96 (a).

Quere.—Whether the Civ. Pro. Code allows a fresh defendant to be substituted for a sole existing defendant against whom it has been found that there is no cause of action. Whether the notice under S. 424, Civ. Pro. Code, is necessary in case of adding, under S. 32 of the same Code, a Public Officer as a co-defendant in the case brought against the Secretary of State for India in Council. **Mrs Fox v. The Secretary of State for India in Council**, 59 P. W. R. 1908.

JOHNSTONE and HURRY, JJ.

Reference — (a) 12 A. 115, R.

Act XXI of 1850 (Freedom of Religion)

Unchastity by Hindu mother, whether affects her rights of inheritance — See HINDU LAW (INHERITANCE), No. 1, 18 M. L. J. 70.

Act XIII of 1855 (Fatal accidents).

(1) Assessment of damages under Act—Measure of damages—Pecuniary loss—Mental suffering—Survivors.

In assessing damages the pecuniary loss sustained by the family of the deceased is all that can be considered and nothing can be allowed the survivors as compensation for mental suffering, etc. **Ratilal Kalidas v. The Madras Railway Co.**, 4 M. L. T. 238.

MOORE, J.

References — 7 B. H. C. 113, 8 B. H. C. 130, 18 Q. B. 93—21 L. J. Q. B. 233, and 8 F. A. 221=42 L. J. Ex. 153, R.

Act XXVIII of 1855 (Usury Laws Repeal Act).

S. 2—Agreement to pay interest express or implied—Interference by Court, whether allowable. See INTEREST, No. 2, 110 P. R. 1908.

Act XV of 1856 (Widow Marriage).

Right of remarried mother to give in adoption her first husband's son, whether affected by Act. See HINDU LAW (ADOPTION), No. 5, 10 Bom. L. R. 1134.

1. — Imperial Acts.—(Continued).

Act XXXIV of 1858 (Lunacy, Supreme Court).

(1) *Lunatic—Remuneration to a Committee—Court's jurisdiction to pass the order—Next of kin of lunatic not entitled to be heard on the application—Lunatic when sane can impeach the order.*

The Court has a discretionary power to allow a Committee of a lunatic, appointed under Act XXXIV of 1858, remuneration but will only allow it under special circumstances. When some relation or friend of the lunatic can be found who is willing to act as Committee, the Court will not, as a rule, allow remuneration to such a person but when no such person can be found and an official of the Court has to be appointed, the Court will exercise its discretion and allow remuneration. But, in all cases, the Court has the jurisdiction.

On an application for remuneration by a Committee of a lunatic, the next of kin of the lunatic have no right to be heard in their own interests, as they have no vested interest in the estate. But a lunatic, if he becomes of sound mind, has the right to impeach any order which, he considers has been made without proper regard to his interest, and he can impeach the order for remuneration even after the Committee has passed his accounts. This right devolves on the lunatic's death upon his heirs. **Mulji Damodar v Bomanji Mancherji**, 10 Bom. L. R. 772.

MACLEOD, J.

Act XL of 1858 (Guardian and Wards).

S. 3—Appointment of Guardian *ad litem* other than the certified guardian—Effect—See EXECUTION OF DECREE, No. 5, 7 C. L. J. 270.

Act XX of 1863 (Religious Endowments).

(1) *Ss. 3 and 11—Form of decree—Court's power to appoint trustee—Trustee's duties—Accounts to be kept and submitted by trustee—Trustee to be a celibate.*

The trustee of a Durga is bound to keep proper accounts. If the Durga falls under S. 3 of Act XX of 1863, he will be bound to submit them to the committee. If it does not, he is, nevertheless, bound to keep separate and clear accounts of the Durga income and expenditure.

Under S. 14 of the Act, the Court may direct the removal of a trustee or a manager. Where a dismissed trustee is in possession of trust properties, he has, on his removal, to be relieved of

1. — Imperial Acts.—(Continued).

Act XX of 1863 (Religious Endowments).—(Continued).

his possession of the trust properties. It is necessary, therefore, to direct surrender of possession. If there is any person already competent to represent the trust, possession may be delivered to him. If the power of appointment is shown to be vested in any person, such person may be directed to make the appointment, and possession may be delivered to him. If there is no person competent to represent the trust, a Receiver may be appointed to take charge of the estate.

Quere.—Whether the Court is competent to appoint a trustee? A married man is unfit to be a *Jamashin* of a Durga. **Miyaji v. Sheikh Ahmed**, 18 M. L. J. 205—21 M. 212.

WALLIS and SANKARAN NAIR, JJ.

(2) *S. 11—Power to appoint a new trustee—Code of Civil Procedure (Act XIV of 1882), S. 539.*

S. 11 of the Religious Endowment Act only empowers a Court to direct the specific performance of any act by the trustee, manager or superintendent or to award damages or costs against such trustee, manager or superintendent and to direct their removal. It confers no power on the Court to appoint a new trustee, manager or superintendent, for which the proceedings provided for by S. 539 of the Code of Civil Procedure must be resorted to. **Sada Shankar v. Hari Shankar** 5 A.L.J. 191 = A.W.N. (1905) 101.

BANERJEE and RICHARDS, JJ.

(2-a) *S. 11—See No. 1, supra.*

(3) *Ss. 11 and 18—Civ. Pro. Code, S. 539—Removal of manager of a religious institution—Power of Temple Committee—Sanction.*

Where there is a duly constituted manager of a religious institution, he cannot be removed from his office except by bringing a civil suit. And, for such a civil suit, previous sanction is required under either Ss. 14 & 18 of the Act or S. 539, Civ. Pro. Code.

It is not open to a self-constituted Committee in the event of a dispute with the manager to take the matter into their own hands, and, if they do so, they run the risk of a successful suit by the ex-manager for re-instatement. **Bansi Dhar v. Chhanga Ram**, 7 P.R. 1908 = 176 P.L.R. 1908—20 P. W. R. 1908.

KENSINGTON and LAL CHAND, JJ.

(3-a) *S. 18—See No. 3, supra.*

1.—Imperial Acts—(Continued).**Act III of 1865 (Common Carriers).**

- (1) *Common Carriers Act (III of 1865), amended by Act X of 1899, S. 10—Steamship Company and Railway Company—Notice before suit.*

S. 10 of the Common Carriers Act as amended by Act X of 1899 placed a Steamship Company in the same position as a Railway and makes it obligatory upon a person wanting to sue a Steamer Company to give notice of such suit within the time mentioned in the section. **Rivers Steam Navigation Co., Ltd v Kashi Prasad**, 8 C. L. J. 192.

MITHA and BELL, JJ.

Act X of 1865 (Succession).

- (1) S. 50—Provision as to attestation, whether applies to other Acts—See TRANSFER OF PROPERTY ACT, No. 29, 3 M. L. T. 300

(2) Ss. 101 and 102—Disposition of residuary estate—Construction of Ss. 3 and 4 of the Hindu Wills Act. See ACT XXI of 1870 (HINDU WILLS ACT), No. 1, 4 M. L. T. 306

(2-a) S. 102—See No. 2, *supra*.

(3) Ss. 137 and 140—Legacy, specific or demonstrative—Particular fund not legally chargeable with payment—Demonstrative legacy, non-redemption of—See WILL, No. 12, 109 P. R. 1908.

(3-a) S. 140—See No. 3, *supra*.

(4) Ss. 160 and 171—Application for Letters of Administration with copy of will, proved abroad, annexed—Original will deposited and registered in Scotland—Copy produced being copy certified under the hand and seal of Notary Public to be true copy of original granted by Assistant Keeper of Register of Deeds—No certificate of having been compared with original—Not shown to be admissible in England—Copy not admissible under S. 63, Evidence Act.

Where, in an application, under Ss. 180 and 212 of the Succession Act, for Letters of Administration with copy of the will, proved abroad, annexed, the original will, described as a trust disposition and settlement having been deposited and registered in Scotland, a copy certified, under the hand and seal of a Notary Public, to be a true copy of the original granted by the Assistant Keeper of the Register of Deeds neither purporting to be a copy made from the will itself nor bearing any certificate that it had been compared with the original, nor shown to be a copy admissible in England to prove the original, was produced.

1.—Imperial Acts—(Continued).**Act X of 1865 (Succession)—(Concluded).**

Held that the copy produced was not a properly authenticated copy of the will and inadmissible as secondary evidence, under S. 63 of the Evidence Act, and that the applicant should produce a copy certified, by the Keeper or Assistant Keeper of the Register, to be a true copy of the original will. **In the matter of the estate of Adam Robertson Whyte**, 14 Buz. L. R. 33.

MOORE, J.

(4-a) S. 212—See No. 4, *supra*.

(4-b) S. 234—See No. 5, *infra*.

(5) Ss. 242 and 244—Amending Act VIII of 1903—Application for extension of certificate—Revocation of the grant of probate—Court Fees Act, S. 19 (c).

An application for probate to have effect throughout the Province of Sind was granted. But the testator also left some money due from a Life Insurance Company, the head office of which was situated at Bombay, and the Company refused to pay the money as the probate had no effect in Bombay.

Held, on an application for the extension of the probate to the whole of India,

(1) that no extension could be ordered inasmuch as the preliminaries required by Act VIII of 1903 had not been complied with, and that those preliminaries were not mere empty formalities,

(2) that the grant might be annulled under S. 244, Explan. 4, of Act X of 1865, in order that a fresh grant might be applied for, which will be exempt from further Court-fee under S. 19 (c) of the Court-fees Act, 1870. **Application by Elizabeth A. Desouza for Probate of Will of Alfred James Desouza under Act X of 65**, 1 S. L. R. 177.

HAYWARD, J.

(6) Applicability of provisions of Act, made applicable to wills of Taluqdars and grantees, to all the wills and codicils executed by them without exception to particular class of such wills and codicils—See WILL, No. 1, 11 O. C. 102 (B).

Act XV of 1865 (Parsi Marriage and Divorce).

S. 32—Divorce—Adultery of petitioner.

Under S. 32 of the Act, adultery of the petitioner is a legal ground on which the Court can refuse the petition for divorce. **Meherbhai v. Hormasji N. Motivala**, 10 Bom. L. R. 1019.

CHANDAVARKAR and HEATON, JJ.

I.—Imperial Acts—(Continued).**Act IV of 1869 (Divorce).**

(1) *Suit for dissolution of marriage—Proof of Adultery—Civ. Pro. Code, S. 82—Necessity for personal service—Advertisement in newspapers.*

Petition for dissolution of a marriage. Petitioner alleged the adultery of respondent. The only evidence in proof of the adultery was to the effect that the wife (respondent) had left petitioner and had been seen on two occasions in company with two boys in a house which was not alleged to be a brothel. *Held*, this was not evidence sufficient to prove adultery. It did not constitute adultery with the two boys or either of them. So a decree for dissolution of marriage could not be granted.

S. 82 of the Code of Civ. Procedure, does not contemplate substituted service being granted except, after reasonable endeavours, to serve a summons personally.

A mere advertisement in newspapers of a petition for dissolution is not sufficient to bring the fact of the petition home to the respondents in the absence of proof that endeavours were made to serve the respondent personally. **Shwe Tha v. Ma Saw Hla.** 4 L. B. R. 195.

Fox, C. J., IRWIN and MOORE, JJ.

(2) *S. 10—Sued by wife for dissolution of her marriage with husband under Husband not appearing at the hearing—Husband committing adultery after last condonation of former adultery and cruelty, effect of.*

Where the wife sued, under S. 10 of the Indian Divorce Act (IV of 1869), for dissolution of her marriage with her husband (who filed a written statement but did not appear at the hearing of the case) by reason of the cruelty and adultery of her husband and deposed that he suffered from a contagious and loathsome disease, which he communicated to her, *held*, on medical evidence, that it must be presumed that the husband recklessly or wilfully communicated it to his wife, for, when a husband, being a competent witness, does not come forward to assert his ignorance, the Court will hold the wilful intention proved (a). Where the husband committed adultery after last condonation of former adultery and cruelty, *held*, that the subsequent adultery revived the former cruelty, which had been condoned. **Ma On v. Maung Aung Bwa**, 14 Bur. L. R. 173.

MOORE, J.

I.—Imperial Acts—(Continued).**Act IV of 1869 (Divorce)—(Concluded).**

References.—(a) L. R. I. P. 146; 35 L. J. P. & M. 13, L. R. I. P. 233, F; (b) I. S. & T. 61, 29 L. J. P. & M. 126, F.

(3) *Ss. 14 and 50—Practice—Petition, service of—Substituted service—Unreasonable delay.*

The practice of this Court, as to service of petition on the respondent, is governed by what prevails in the Matrimonial Courts in England.

It is essential, in suits for dissolution of marriage, that the petition of the plaintiff should be personally served, under S. 50 of the Indian Divorce Act, on the respondent or that sufficient notice of its contents should be given to him.

Unless satisfactory explanation is given for the long delay in presenting and prosecuting a petition, a Court is obliged to refuse a decree for dissolution of marriage, under S. 14 of the Indian Divorce Act. **Arabella Clarressa Eliza Mitter v. John Charles Mitter**, 12 C. W. N. 1009.

FLETCHER, J.

(4) S. 50—See No. 3, *supra*.

Act VII of 1870.

See COURT FEES ACT.

Act XXI of 1870 (Hindu Wills).

(1) *Ss. 3 and 4—Construction of—Indian Succession Act, Ss. 101 and 102—Residuary Estate.*

In an appeal which turned upon the construction of the will, which purported to deal with residuary estate of the testator, who practically intended that the distribution should take place only after all the sons who might be born to him had attained their majority, and whose will ran as follows: "Should my son Subramanian who is the (chief person or) executor to this will and testament be willing to divide and give the aforesaid landed properties, ready money and all the other properties, when my grandsons may attain their age, he shall divide the same into five shares as I have had five sons, and give away the same to their respective sons, that is to say, my grandsons. He shall give away the share of such son of mine as may not beget a grandson (to me) to himself. Should he not be willing to effect a division, he may deliver up the properties to such of these persons, namely, his brothers, or his sons, or his brother's sons, as may be competent to cause

I.—Imperial Acts—(Continued).**Act XXI of 1870 (Hindu Wills)—(Concluded).**

matters to be conducted properly, as my eldest son Subramanian who is the (chief person or) executor to this will and testament had been conducting them; should the (chief person or) executor Subramanian be not willing to do so, he may, as he thinks proper, arrange that at least the Administrator-General should conduct matters for a fixed time in the same manner in which he himself shall have conducted matters and that the properties should thereafter be divided and given to the aforesaid grandsons or that the same should be delivered up to them intact without division," it was held that the effect of the disposition was that the bequest, if any, created by the exercise of the so-called power of appointment, might be delayed beyond the period specified in S. 101 of the Indian Succession Act which, when read with S. 102, made the whole disposition invalid. S. 2 of the Hindu Wills Act makes S. 101, Succession Act, applicable in terms, and the provision in S. 3, although it might have the effect of invalidating a disposition which is valid under S. 101 of the Succession Act, cannot have the effect of validating a disposition which is invalid under that section. It is clear, therefore, that the disposition is invalid under Ss. 101 and 102 of the Succession Act, and there is an intestacy with regard to the residuary estate and the property devolves upon the heirs-at-law. **P. V. Sivasankara Pillai v. P. V. Subramania Pillai**, 4 M. L. T. 306.

WHITE, C.J. and SANKARAN NAIR, J.

Reference.—L. R. 10 Ch. 35, R. and D, 20 B. 450, R.

(2) S. 4—See No. 1, *supra*.

Act XXIII of 1871 (Pensions).

(1) S. 2—*Scope of the section—Personal grants—Endowment for religious and charitable purposes—Suit to set aside Government order imposing full assessment on lands granted for charitable purposes—Jurisdiction of Civil Courts.*

Endowments for religious or pious purposes do not fall within the purview of S. 4 of the Act; the section applies only to personal grants (a).

The Civil Courts have, therefore, jurisdiction to entertain a suit to set aside a Government order imposing the full assessment on certain lands in the plaintiff's possession, granted to his ancestors as an endowment for the charit-

I.—Imperial Acts—(Continued).**Act XXIII of 1871 (Pensions)—(Concluded).**

able purpose of feeding brahmins. **Venkateswara Aiyer v. The Secretary of State for India in Council**, 17 M. L. J. 549=3 M. L. T. 104=31 M. 12.

BENSON and SANKARAN NAIR, JJ.

References.—(a) 2 M. 294, 5 M. 302, 6 M. 361, 11 M. 283, P., 22 B. 496, Diss.; 8 I. A. 77 (P. C.), R.

Act I of 1872.

See EVIDENCE ACT

Act IX of 1872.

See CONTRACT ACT.

Act VIII of 1873 (Northern India Canal and Drainage)

(1) Ss. 21, 22, 24 & 25—*Suit to restrain party who has been permitted under the Act to construct water channel—Jurisdiction of Civil Court.*

A Civil Court has no jurisdiction to decree a perpetual injunction restraining a party, to whom permission has been granted under the Act of 1873 to construct a water channel through the land of another, from constructing that channel, provided that the procedure prescribed by the Act has been complied with.

Mokham Din v. Mansabdar, 74 P. R. 1907=16 P. L. R. 1908.

REID, J.

References.—56 P. R. 1897, 46 P. R. 1897, 144 P. R. 1891, 71 P. R. 1886, 114 P. R. 1888, 14 C. 648, R.

(2) S. 22—See No. 1, *supra*.

(3) S. 24—See No. 1, *supra*.

(4) S. 25—See No. 1, *supra*.

Act X of 1873 (Oaths).

(1) *Suit on promissory note—Suit by assignee—Fraudulent assignment—Oath as to consideration, effect of—*

The plaintiff sued the defendant on a promissory note executed by the defendant in favour of the plaintiff's endorser. The defendant contended that there was no consideration for the note and that the assignment was fraudulent. In the course of the suit the defendant offered to abide by the oath of the plaintiff's third witness. This man took oath. Held that the oath was not conclusive as to the suit, but only as to the facts deposed to in the oath, and that the party affected by the oath was

I.—Imperial Acts—(Continued).**Act X of 1873 (Oaths)—(Concluded).**

entitled to a distinct finding by the Court as to whether the assignment was fraudulent or was made in fact.

Held, also, that where the plaintiff sues as the endorsee of a pro-note, and it is found that the endorsement was fraudulent and was not in fact made, the plaintiff would not be entitled to a decree on the note. **Jattanna Pakkala v. Bala Sheka**, 3 M. L. T. 163.

BENSON and WALLIS, JJ.

References :—(a) 2 M. 356 & 22 M. 234, R.

(2) *Ss. 8, 9 and 12—Agreement by plaintiff to take oath or to have the suit dismissed—Failure to take oath—Procedure to be adopted by the Court.*

By an agreement between the parties to a suit, the plaintiff agreed that he should take an oath, and that, on his failure to do so, the suit should be dismissed. *Held*, on the failure of the plaintiff to take the proposed oath, that the agreement could not be recorded as an adjustment of the suit, and the suit should be proceeded with (a). •

Per White, C. J.—S. 12 of the Oaths Act directs the Court to record, as part of the proceedings, the nature of the oath proposed, the fact that the party was asked to make the oath and refused, together with any reason assigned for the refusal. The section seems to contemplate that the Court shall give such weight, as it may think fit, to the fact that a party has offered to make an oath, and has afterwards refused to make it, whilst it negatives the view that the refusal to make the oath is, in itself, a ground for dismissing the suit or giving the plaintiff a decree, as the case may be.

Per Miller, J.—It may be doubted whether S. 12 of the Act was intended to apply to a case, in which the parties have arrived at an agreement that one of them shall take an oath, but, whether that be so or not, it is not right to compel a man against his will to take an oath, by which he is to allege the existence of particular facts. **Majan v. Pathukutti**, 17 M.L.J. 545=3 M. L. T. 98=34 M. L. .

WHITE, C.J. and MILLER, J.

References :—(a) 2 M.356, F., 17 M. L. J. 99, D.

(3) S. 9—See No 2, *supra*.

(4) S. 12—See No 2, *supra*.

I.—Imperial Acts—(Continued).**Act I of 1877.**

See SPECIFIC RELIEF ACT.

Act III of 1877.

See REGISTRATION ACT (III OF 1877).

Act XY of 1877.

See LIMITATION ACT.

Act VI of 1878 (Treasure Trove).

Ownership regarding unclaimed treasure—
See UNCLAIMED PROPERTY, No. 1, 2 M.L.T.219.

Act XI of 1878 (Arms).

(1) S. 25—House search—Code of Criminal Procedure (Act V of 1898), Ss. 94, 105 and 165—Judicial Officers Protection Act (XVIII of 1850), S. 1.

The defendant who did not, before causing the search of the plaintiff's house to be made, first record the grounds of his belief as provided for by S. 25 of the Arms Act, could not justify the search under the provisions of the said Act.

As there was no proceeding pending before him, the defendant was not a 'Court' within the meaning of S. 94 of the Code of Criminal Procedure, and, therefore, the defendant could not direct a search to be made in his presence under the provisions of S. 105 of the Code.

The search having been for the purposes of discovering arms generally, Section 165 of the Code did not apply.

Conducting a search for arms is not an act done in the discharge of a judicial duty. Act XVIII of 1850 (Judicial Officers Protection Act) does not apply to such a case.

Even where a defendant's *bona fides* in conducting a search is established, it does not release him from the obligation the law casts upon him, as being in supreme control of the search party, of seeing that the search was conducted in a proper and reasonable manner. In such a case, the damages should be substantial, and not merely nominal. **Brajendra Kishore Roy Chowdhury v. Clarke**, 8 C.L.J. 75=12 C.W.N. 973.

FLETCHER, J.

Act III of 1879 (Inspection of Steam Boilers).

Contract with public servant—Conflict with public duties—Validity of contract—Consequence of expert not exercising his special skill and relying upon others—Negligence—Damages. See CONTRACT ACT, No. 15, 13 C.W.N. 59.

I.—Imperial Acts—(Continued).

Act XVIII of 1879 (Legal Practitioners.)

- (1) *Unprofessional conduct—Suspicion—Muktear—Renewal of license.*

The renewal of the license of a legal practitioner cannot be refused on the mere suspicion that he was implicated in, and privy to, the sending of anonymous petitions making serious allegations against a Sub-divisional Officer and other Government Officers. *In the matter of Babu Nirajan Prosad Mohanty, Muktear*, 12 C.W.N. 919=4 M.L.T. 155.

CASPERSZ and SHARFUDDIN, JJ.

- (2) *Ss. 3 and 36—District Magistrate declaring a person to be a tout—Procedure—Personal inquiry necessary—Opportunity to show cause.*

Before proceeding to declare a person to be a tout, the District Magistrate should himself make an inquiry as to the person's antecedents and give him an opportunity to show cause.

Where a Sub-divisional Officer called on a person to show cause why he should not be declared a tout, and he showed a cause, and the Sub-divisional Officer, after recording evidence on both sides, submitted the proceedings with his report to the District Magistrate, and the latter after perusing them passed order declaring the person to be a tout, the order was set aside (a). *Chandi Charan Dey*, Petitioner, *Re*, 12 C. W. N. 842.

RAMPINI, C. J., and RYVES, J.

- *Reference* :—(a) 6 C.W.N. 289, *F*.

- (3) *S. 13—Compromise by client.*

A legal practitioner, who, believing himself to be under a pecuniary liability to his client, endeavours to get the client to accept a less amount than that for which he is liable, is not guilty of "grossly improper conduct in the discharge of his professional duty" within the meaning of S. 13 of the Legal Practitioners' Act. *Ahsan Ali*, *In the matter of*, 5 A.L.J. 126 = A.W.N. (1908), 70=7 Cr. L.J. 300.

STANLEY, C. J., BANERJI and AIKMAN, JJ.

- (4) *Ss. 13 and 14—Pleader—Unprofessional conduct—Refusal of brief for political reasons—Right to refuse—Reasons for refusal, if must be stated—Right to move High Court to quash proceedings when called upon to show cause.*

A pleader is not bound to accept a brief offered to him nor to state his reasons for refusing to accept it.

I.—Imperial Acts—(Continued).

Act XVIII of 1879 (Legal Practitioners)—(Continued).

A pleader, having refused a brief offered to him, was subjected to a stringent examination to disclose his reasons, and, on its appearing that his reasons were political, proceedings were started against him under the Legal Practitioners' Act and he was called upon to show cause why he should not be reported to the High Court for unprofessional conduct. Without waiting to show cause, the pleader, at once, moved the High Court to quash the proceedings.

Held—That he was entitled to do so :

That there was no rule of procedure to justify the examination to which he was subjected. *In the matter of Nabin Chandra Das Gupta*, 12 C.W.N. 381=7 Cr. L. J. 252=35 C. 317.

MACLEAN, C. J., and COXE, J.

- (5) *S. 14—Professional misconduct by pleader—Charge before a joint Magistrate—Transfer of the Magistrate before inquiry to another division—Flight of District Magistrate who was transferred to the other division—Pleader accusing Magistrate as acting maliciously, vexatiously, and with a vindictive spirit, whether amounts to professional misconduct.*

A pleader was charged with professional misconduct in connection with the alteration of the date in a certain petition, which was presented to a Sub-Magistrate. The case came before the joint Magistrate of that division for inquiry. The joint Magistrate, before the date of the inquiry, was transferred to another division. The District Magistrate made an order transferring the charge to the same joint Magistrate, on the ground that he had dealt with the matter in the first instance.

Held, that the order of the District Magistrate, transferring the charge to the joint Magistrate of a different division, was unauthorized, and that it should accordingly be set aside.

There is no provision of law which authorizes the issue of either a summons or a warrant against a pleader who fails to appear in answer to a charge preferred against him under S. 14 of the Legal Practitioners' Act.

Where a Magistrate issued a warrant against a pleader in such a case, and the pleader attached a written statement to the warrant in which he stated that the Magistrate, in issuing the warrant, had acted maliciously, vexatiously,

1.—Imperial Acts.—(Continued).**Act XVII of 1879 (Legal Practitioners).—(Continued).**

and with a vindictive spirit, it was held, that such language, though to the last degree improper, did not amount to fraudulent, or grossly improper conduct in the discharge of his professional duty, within the meaning of S. 14 of the Legal Practitioners' Act. **K. R. Ramachandra Iyer**, *In re*, 3 M.L.T. 237=7 Cr. L. J. 393=18 M.L.J. 184.

WHITE and MILLER, JJ.

References:—4 R. R. P.C. 283, 24 M. 17, F.

(6) S. 14—Crim. Pro. Code, Ss. 145 and 439—Revision—Jurisdiction of High Court See CIV. PRO. CODE, No. 355, A.W.N. (1908), 273.

(6-a) S. 14—Sec No. 4, *supra*.

(7) S. 36—*Tout*, declaring a person to be—District Judge to take evidence himself—Power to direct Munsif to take it—Opportunity to show cause—Procedure when Munsif suspects a person to be a tout.

S. 36 of the Legal Practitioners Act is of a final nature and its provisions must be strictly and precisely complied with.

It is only the judges and other officers specially mentioned in S. 36 of the Legal Practitioners Act who can frame and publish a list of tous, and they can only frame and publish such a list when it has been proved to their satisfaction by evidence taken and heard by themselves that the person whom they propose to include in the list habitually acts as a tout.

A District Judge has no power to delegate to the Munsif the special statutory powers conferred upon him by that section.

When a Munsif has reason to suspect that any person is acting as a tout, he should inform the District Judge of his suspicions, giving him the names of witnesses and leaving it to him to take and hear evidence. *In the matter of Prasanna Kumar Das*, Petitioner, 12 C.W.N. 843 (Note).

MACLEAN, C.J. and BANNERJEE, J.

(8) S. 36—Order declaring certain persons to be tous—Revision—Jurisdiction—Practice—Statutes 24 and 25, Vict. Cap. CIV. S. 15—Rules of High Court of the 18th January 1898, rules 1 (xiv) and 4

The District and Sessions Judge of Meerut held an inquiry under Section 36 of the Legal Practitioners' Act, 1879, as the result of which he ordered certain persons to be proclaimed to be tous and excluded from the precincts of the

1.—Imperial Acts.—(Continued).**Act XVIII of 1879 (Legal Practitioners).—(Concluded).**

Courts in the judicial division. The parties affected applied to the High Court against the Judge's order under Section 15 of Statute 24 and 25 Vict., Cap. CIV. On this application being laid before a division Bench for disposal, it was held.—

Per KARAMAT HUSAIN, J., that the disciplinary powers of the High Court, under Section 15 of the Statute, being exercisable only by the full Court, a bench of two Judges had no jurisdiction to adjudicate upon the application, neither had a single Judge jurisdiction to admit it.

Per AIKMAN, J., that the Court had an inherent power to delegate to one or more of its members the power to deal with applications such as the present, and rule 1 (xiv) of the Rules of Court of the 18th January 1898 effected such a delegation. But the powers of the Court under Section 15 of the Statute were limited, and in this instance no case for their exercise had been shown. **Kedar Nath**, *In the matter of the petition of*, A. W. N. (1903), 279.

KARAMAT HUSAIN and AIKMAN, JJ.

(9) S. 36—Sec No. 2, *supra*

Act Y of 1881 (Probate and Administration).

(1) Ownership of property by married couples—Devolution—Letters of administration whether and when can be granted to any person other than survivor of married couple—Proper person to administer estate.

Under the Burmese Buddhist Law respecting the ownership of property by married couples, and the devolution of such property on the death of one of them, the widow or widower, as a general rule, is the proper person to administer the estate of the deceased. Though an absolute rule must not be laid down that in no circumstances should letters of administration be granted to any other person, as, for instance, a step-daughter of the widower, it would require very special reasons to justify such a grant.

Where a widower is in possession of the estate as the natural and proper representative of the deceased widow, any person who claims a share of the estate can sue him for it, and the fact, that letters of administration have not been issued, is no obstacle to such a suit. **Ne Win v. Ma Aung Gale**, 4 L. B. R. 293.

IRWIN, C.J. and ORMOND, J.

1.—Imperial Acts—(Continued).

Act V of 1881 (Probate and Administration)—(Continued).

- (2) *Ess. 13 and 33—Administration—Letters of administration granted to minors under the guardianship of their father.*

Under Act V of 1881, Letters of Administration cannot be granted to minors under the guardianship of their father. **Jai Lal Singh v. Hari Singh**, A. W. N. (1908), 257—5 A. L. J. 736.

AIKMAN and KARAMANT HUSAIN, JJ.

- (3) *S. 17—Application for probate by official trustee—Intention to renounce expressed in a letter—Subsequent retraction—Effect.*

Where the official trustee merely wrote a letter to a certain person intimating his intention of renouncing probate, but, subsequently, that intention was withdrawn before the matter came before the Court and no such renunciation was ever directly made before the Court, nor was any writing intimating such renunciation was filed in Court, it was held that there was no formal renunciation in that case, and that the official trustee was not precluded from applying for the probate (a).

Held, also, there was nothing in the official Trustees Act prohibiting the official trustee from being appointed as an executor and acting as such. *In the goods of Manick Lal Seal*, 35 C. 156.

CHITTY, J.

References :—(a) L. R. 3 P. & D. 151, C. W. N. (Notes), clv. 25 C. 795, L. R. 3 P. & D. 113, R.

- (4) *S. 23—Object of granting letters of administration—Right of younger daughter of deceased Burman Buddhist to letters of administration during the life-time of mother—Agreement of parties, whether can change personal law.*

In the case of one of a Burmese Buddhist married couple dying, it can rarely, if ever, be necessary that letters of administration to the deceased's estate should be granted after the period of limitation for the recovery of debt owing to or by the deceased has expired.

An younger daughter of a deceased Burman Buddhist is not, during the life-time of her mother, a proper person to be granted letters of administration to the estate of her deceased father, especially where the application was made 18 years after the death of the father.

1.—Imperial Acts—(Continued).

Act V. of 1881 (Probate and Administration)—(Concluded).

If a child of Burmese Buddhist parent has a right to prevent his or her surviving parent from wasting the one-half of the property in which the parent has only a life-interest, the proper method of enforcing such right is by a regular suit. Procedure under the Probate and Administration Act cannot be used for such proposes.

If a person was not, in fact, governed by the Burmese Buddhist Law of inheritance, the agreement of the parties cannot make such law applicable. **Ma Pe v Ma Thein Yin**, 4 L. B. R. 287=14 Bur. L. R. 280.

FOX, C.J. and IRWIN, J.

Reference —S.J., L. B., 378, F.

(4-a) S. 33—See No. 2, *supra*

- (5) *S. 41—Application by executor's son—Discretion*

A testator bequeathed, by will, the whole of his property to an idol and appointed his wives and son executrices and executor, who, however, did not take out any probate, but the son mortgaged the property. After the property was sold in execution of a decree on the mortgage, the testator's grandsons, under the guardianship of their mother, applied for probate of the will.

Held, they, being not executors, were not entitled to probate, and the case was not a fit one for grant of probate under S. 41 of the Probate and Administration Act; the mother being a pardaunashm lady, the father, the defaulting executor, would manage the whole business. **Narendra Kumar Pramanick v. Charu Chunder Pramanick**, 7 C L.J. 558=12 C.W.N. 747

MACLEAN, C.J., and DOSS, J.

- (6) *S. 50—Oral will—Grant of letters of Administration—Its revocation as regards a portion of the deceased's property on the ground of an oral will.*

P, a *Saraugi*, died after a short illness of plague, leaving a shop and *haveli* and other property, and a grant of Letters of Administration was made in favour of M. Afterwards, J and others, alleging themselves to be managers of a *Saraugi* temple, applied for revocation of the said grant, on the ground that P, before his death, had bequeathed the shop and *haveli* to the said temple.

1.—Imperial Acts—(Continued).**Act V of 1881 (Probate and administration)—(Concluded).**

Held, that, as the oral will was established, the grant of Letters of Administration was rightly revoked under para. 3 of S. 50 of Act V of 1881 *qua* the *shop* and *haveli*. **Mangtu v. Jowala Mal**, 8 P.W.R. 1908.

BATTIGAN, J.

(7) Ss. 51, 52 & 86—District Judge—Assistant Judge deciding applications wherein the subject-matter does not exceed Rs. 5,000 in value—Appeal to District Court—No direct appeal to High Court—Power of local Legislature to amend an Act passed by Supreme Legislative Council. See ACT XIV OF 1869, AMENDED BY ACT I OF 1903 (CIVIL COURTS). No. 1, 10 Bom. L.R. 924.

(7-a) S. 52—See No. 7, *supra*.

(8) S. 78—Act No. IX of 1872 (*Indian Contract Act*), S. 129—Administration—Surety—Continuing guarantee.

When a person becomes surety that an administrator will duly get in and administer the estate of a deceased person, this is not a continuing guarantee within the meaning of Section 129 of the Indian Contract Act, 1872. Such a surety cannot, of his own free will, withdraw from his suretyship. **Kandhya Lal v. Manki**, A.W.N. (1908), 288.

AIKMAN and KARAMAT HUSAIN, JJ.

References.—28 M. 161, F; 29 C. 68, Diss.

(9) S. 86—See No. 7, *supra*.

Act XXVI of 1881 (Negotiable Instruments).

(7) Ss. 7, 32, 53, 64, 115 and 134 —Bills of exchange—Acceptance by drawee—Acceptance taken on copies of bills not a valid acceptance—Bills endorsed over to a drawee in case of need—Holder in due course—The drawee can maintain the suit without disclosing his principal, as a holder in due course—Bills accepted need not be dishonoured and protested—Liability of acceptor at maturity of the bills—Assent not signed on bills but on copies—Assent not valid.

The plaintiff sued to recover on certain bills drawn on the defendant and endorsed over to the plaintiff, the defendant having failed to pay them. In one of the suits, the acceptance by the defendant was signed upon the original bill but in others it was merely on copies of the bills. The lower appellate court threw out the first suit on the grounds the plain-

1.—Imperial Acts.—(Continued).**Act XXVI of 1881 (Negotiable Instruments)—(Continued).**

tiff was suing as agent for the London firm, Francis Timos & Co., without disclosing his principals, so that the suits were defective in form and, secondly, that the suits were not competent as the bills had never been dishonoured and protested. The remaining suits were dismissed upon the ground that the acceptance was written on copies of the bills.

Held, (1) that the bills were indorsed over to the plaintiff by the Banks in whose favour they were drawn, so that he was a holder deriving title from the holder in due course; and as such he was competent to sue under S. 53 of the Negotiable Instruments Act, 1881.

(2) That the bills were made payable in Bombay, and, consequently, under Ss. 134 & 32 of the Act, the acceptor became liable at the Maturity of the bills. Presentment is not necessary to charge the acceptor. The acceptor was the principal debtor and his liability was independent of presentment.

(3) That, whereas S. 7 of the Act lays down that the acceptance shall be signed either upon the bill or upon one of its parts, the defendant's assent was signed only upon copies of bills, and thus a material requirement of the law was omitted with the result that there was no valid acceptance. **Ardeshtir Porabsha Moos v. Kushaldas Gokuldas**, 10 Bom. L. R. 268 = 32 B. 247.

JENKINS, C. J. and BATCHELOR, J.

(1-a) S. 28—Word, "*Daskat*", meaning of—Son signing a *hundi* on behalf of the father—Son working with the father in a common business.

The term, "*Daskat*", means that a person signing a document signed as managing clerk on behalf of the principal, and no personal liability can attach to him from that.

Where a son signs a *hundi* on behalf of his father and it is also found that the father and the son have been carrying on the business in apparent unity, *held* that the son is equally liable with the father for the debt. **Silleman Datoo v. Iso Muso**, 2 S. L. R. 11.

LUCAS, J. C. and KNIGHT, A. J. C.

(2) Ss. 30, 39 and 86—*Hundi* payable at sight—Liability of drawer where holder agrees to an agreement with acceptor for payment—Notice of dishonour, omission to give—Discharge of drawer.

1.—Imperial Acts—(Continued).**Act XXVI of 1881 (Negotiable Instruments)—(Continued).**

Where the acceptor of a hundi payable at sight at first accepted the hundi unconditionally, but, subsequently, said he would pay in three days' time, and the holder of the hundi agreed to this arrangement of which, however, he did not give any notice to the drawer, and where, the acceptor having failed to pay the amount of the hundi within the three days, the holder did not give notice of dishonour till after 10 days :

Held, that the conduct of the holder discharged the drawer from his liability under the hundi according to the terms of Ss. 30, 39 and 86 of the Negotiable Instruments Act. **Askaram Baid v. Piyar Bux**, 12 C.W.N. 644 = 8 C.L.J. 163.

RAMPINI and SHARFUDDIN, JJ.

(2-a) S. 32—See No. 1, *supra*.

(2-b) S. 39—See No. 2, *supra*.

(3) S. 50—Requirements of S. 50 to enable exclusion or restriction of right of further negotiation of promissory note—Endorsement to contain express words to that effect—See PROMISSORY NOTE, No. 1, 14 Bur. L. R. 25.

(3-a) S. 53—See No. 1, *supra*.

(3-b) S. 64—See No. 1, *supra*.

(4) *Sec. 80—Nattukottai Chetties' way of signing and drawing bills—Bill of Exchange—Construction—Interest—Independent agreement.*

With regard to the Nattukottai Chetties who carry on most extensive business by means of agents in different parts of India, it is well known that they trade under names made up of a series of initials. In firm transactions, the initials, which are the name of the firm, are prefixed to the name of the signatory, and this is the ordinary way in which documents are signed on behalf of these firms, and may even be said to be the ordinary way in which these firms sign.

In considering whether a signature in a bill is that of the principal or agent by whose hand it is written, the construction most favourable to the validity of the instrument must be adopted.

S. 80 of the Negotiable Instruments Act does not affect the validity of collateral agreement to pay interest at a specified rate as to which the hundie is silent. **Mangumal Jessa Singh**

1.—Imperial Acts—(Continued).**Act XXVI of 1881 (Negotiable Instruments)—(Concluded).**

v. A. L. Y. R. C. T. Firm and another, 4 M.L.T. 809.

WALLIS, J.

(5) S. 86—See No. 2, *supra*.

(6) S. 115—See No. 1, *supra*.

(7) S. 134—See No. 1, *supra*.

Act II of 1882 (Trust).

(1) S. 5, proviso to Ss. 5, 81 & 83—Bequest with instructions—Instructions suppressed—Validity of trust—Position of legatee—Whether trustee holds absolutely or for legal representatives' benefit—See WILL, No. 6, 18 M.L.J. 158.

(2) Ss. 5 and 6—Gift—Imperfect gift—Court's power to construe it as trust—Creation of trust—Donor's intention and acts. See *GIRF*, 10 Bom. L.R. 1209.

(3) *S. 34—Applicability of, to public charitable trust—Proper remedy in such cases—Whether Collector, Chaplain, &c., are corporation sole—Effect of constituting such as trustees.*

On 28th April, 1862, one C executed a trust deed, constituting the Collector of Karachi, the Chaplain and the officer commanding the troops, trustees for administering certain property mentioned in the deed, and giving the rents and profits thereof in charity to the poor. On the 29th May, 1907, the gentlemen holding the said offices at the time, filed an application under the Trust Act for permission to sell the property and invest the sale proceeds thereof in some recognized securities; the interest accruing therefrom being appropriated for the purpose specified in the trust.

Held that the application could not be made, as Section 1 of the Act excluded public charitable trusts from the scope of the Act. *Held* also, that, as the officers mentioned in the trust deed were not corporations sole, and as only legally recognized persons could be appointed trustees, the effect of appointing them as trustees was to be restricted to those only who were holding the offices at the time the deed came into operation. The present incumbents of those offices could at best be considered as constructive trustees, to which case S. 34 was inapplicable. The proper remedy open to them under the circumstances was a suit under S. 539, Civil Procedure Code, or an application

1.—Imperial Acts—(Continued).**Act II of 1882 (Trusts).—(Concluded)**

under Ss. 4 to 6 of the Charitable Endowments Act, 1890. **Application by Gerald Edward, Nicolls & others**, 1 S.L.R. 218.

HAYWARD, J.C.

(4) S. 84—Property transferred for illegal purpose—Illegal purpose not carried out—Suit to recover such property—Condition for recovery—Burden of proof—See **TRANSFER**, No. 1, 4 N.L.R. 26.

Act IV of 1882.

See **TRANSFER OF PROPERTY ACT**.

Act VI of 1882 (Companies).

(1) S. 61—Articles of association—Construction—Resolution of directors necessary to effect forfeiture of share—Continuance of membership of company till date of winding up—Call before winding up—Limitation Act, Art. 112—New liability—Liquidation.

On a construction of the articles of association of a Company, a resolution of the directors was held to be necessary to effect a forfeiture of the appellant's shares, and, in the absence of any proof or indication that there was any such resolution, it was held that the appellants continued to be members of the company until the date of the winding up.

Consequently, even though the recovery of the unpaid portions of the calls might have been barred under Art. 112 of the Limitation Act, if the company had sued for them, yet this did not affect the new liability created by S. 61 when the company went into liquidation. **Yaldiwara Aiyar**, *In re*, 3 M.L.T. 250=31 M. 66.

BENSON and MILLER, JJ.

References.—(a) L. R. 9 Ch. D. 595, R. 20, B. 654, F.

(2) S. 128—Company—Winding up order—Court's discretion to make the order—"Just and equitable."

When the law requires the fulfilment of one or more of several conditions before an order can be made, the part fulfilment of two or more of such conditions cannot be taken as having cumulative effect justifying the order.

If the Court comes to the conclusion that the main original object for which the Company was formed has substantially failed, or that the substratum of the company is gone, it will consider that it would be just and equitable

1.—Imperial Acts—(Continued).**Act VI of 1882 (Companies).—(Continued).**

to wind up the company, and will make an order of compulsory winding up.

The Court will not be justified in making a winding up order merely on the ground that the company has made losses and is likely to make further losses. *In re*, **Indian Companies Act** *In re Sha Steam Navigation Company*, 10 Bom. L. R. 107=32 B. 415.

DAVAR, J.

(3) S. 149—Power of Court to deprive secured creditor of possession of his security—See **CONTRACT ACT**, No. 36, 3 M.L.T. 247.

(4) S. 169—Winding up of a company—Appeal from winding up order—Appeal—Limitation—Extension of time—Applicability of Ss. 5 and 12, Limitation Act, to period prescribed by S. 169—Claim for balance of money due to contractor—Charge upon buildings—Limitation Act, Art. 132.

According to S. 169, a person filing an appeal against an order made in the matter of the winding up of a company, must file his appeal with such promptitude as to render service of notice upon the respondent at least possible within the three weeks allowed by the section. (*Per* Johnstone, J.).

The notice required by the section need not be notice of *hearing of appeal*. The appellant should add in his memorandum of appeal a separate petition asking, in view of the section aforesaid, that a special notice be at once issued to the respondent intimating that an appeal has been filed.

Although S. 169 allows an extension of time, that extension should not ordinarily be given in such a way as to extend the three weeks' limitation for filing the appeal. Extension for service of notice under the section should only be given where delay has been caused, not by appellant's *laches*, but by the conduct of the respondent, raising up an equity in favour of the appellant, or by accident, such as mistakes in the office of the appellate Court, &c. Except in circumstances of that sort, no extension should be granted where such extension is asked for after the expiry of the three weeks (a).

In a suit by a contractor, against a company, for the balance of money due to him under a contract for the erection of a building, which expressly provided that the contractor should have a lien on the building for any money due

I.—Imperial Acts—(Continued).**Act VI of 1882 (Companies).—(Concluded).**

to him from the company under the contract, it was held that the period of limitation for the enforcement of such claim was 12 years under Art. 132 of the Limitation Act (b) **Daulat Ram v. The Woollen Mills Co., Ltd.**, 95 P. R. 1908.

CHATTERJI, JOHNSTONE and RATTIGAN, JJ.

References.—(a) 37 L. J. Ch. 51, 22 Ch. D. 484, R. (b) 7 A. 502, D.

Act XIV of 1882.

See CIVIL PROCEDURE CODE.

Act XV of 1892 (Presy. Small Cause Court.)

(1) S. 19 (h).—*Suit to enforce arrears of annuity—Suit to enforce a trust*

A suit to enforce the arrears of an annuity, payable under a will and to which the executors have assented, is cognizable by the Presidency Small Cause Court, it does not fall under S. 19 (h) of the Presidency Small Cause Courts Act, 1882 **Dossibai Framji Markar v. Gooverbai Hormasji Markar**, 10 Bom. L. R. 758

SCOTT, C. J. and HEATON, J.

Reference.—3 Atk. 223, R.

(2) S. 38.—See CIV. PRO. CODE, No. 354, 4 M. L. T. 325.

(3) S. 69.—*Question whether cheque was presented within reasonable time, whether one of fact—Whether the Small Cause Court can refer such question to the opinion of the High Court*

The question whether a cheque has been presented within a reasonable time has to be determined with regard to the nature of the instrument, the usage of trade and of bankers and the facts of the particular case. Such a question is clearly a question of fact and not of law, and it is not therefore a question which the Small Cause Court can refer to the opinion of the High Court under S. 69 of the Act. **The East Indian and Anglo-Indian Deposit and Loan Society, Ltd. v. T. M. Nair**, 4 M. L. T. 89=31 M. 364.

BENSON and MUNRO, JJ.

References.—2 Moody and Robinson, 401, 13 Inns. L. R. 4687, R.

(4) S. 69—Civ. Pro. Code, S. 622—Difference of opinion among the Judges constituting the Full Bench—Disposal of the case according to the opinion of the majority—Legality—Jurisdiction of the High Court. See CIV. PRO. CODE, No. 353, 4 M. L. T. 283.

I.—Imperial Acts—(Continued.)**Act XX of 1882 (Paper Currency).**

(1) S. 25.—*Contract forbidden by law, suit on—Maintainability—*

A party cannot be permitted to sue on a contract forbidden by law.

Thus, the Courts will not allow a person to recover on a document which is of the form expressly forbidden by S. 25 of the Paper Currency Act, unless the document comes within the proviso to that section. **A.R.C.S. Soobramonien Chetty v. R. M. K. Curpen Chetty**, 14 Bur. L. R. 120

FOX, C.J. and HARTNOLL, J.

References.—5 B. & Ald. 335, 24 W. R. 401; 2 M. & W. 119, 46 R. R. 532, F, 16 B. 689, Diss.

Act V of 1883 (Merchant Shipping).

(1) *Collision—Depositions of officers of vessel made at preliminary inquiry—Such depositions not challenged—Plaintiff adducing such depositions in evidence against defendant Company—Admissibility—Evidence Act (I of 1872), Ss. 18, 32 (3) and 33.*

During a preliminary inquiry, held under the Indian Merchant Shipping Act, for the purpose of investigating into a case of collision, where the defendant Company was represented by their solicitor, the officers of the defendant's vessel made certain statements on oath, admitting responsibility for the accident. These depositions were tendered by the plaintiff company in evidence against the defendants, who objected to the reception in evidence of these depositions, on the ground that they do not affect the Company, the employers of the persons who so deposed;

Held that the depositions were admissible in evidence on the grounds, *inter alia*, that the failure of the defendant's solicitor, who appeared at the inquiry and cross-examined, to challenge the accuracy of the statements, made by the officers of the defendant's vessel, afforded a strong presumption that the imputation made against the Company was correct (a) that the attendance of the officers, who made the statements in question, could not be procured without an amount of delay or expense that, under the circumstances, appeared to be unreasonable, and that their statements, under S. 32 (3), Evidence Act,

1.—Imperial Acts—(Continued).**Act V of 1883 (Merchant Shipping—(Concl'd.).**

were statements against their interest. **Asiatic Steam Navigation Company v. Bengal Coal Co.**, 35 C. 751.

WOODROFFE, J.

References:—(a) 12 Q. B. 511, 512; 7 Cox. C. C. 76; 3 Cl. and Fin. 159, 209, L. R. 8 Ch. D. 148; L. R. 27 Ch. D. 251, and 19 W. R. 288, R.

Act II of 1886 (Income Tax).

- (1) *S. 14—Income tax payable by one party—Compulsory payment by another—Right to recover same from party alleged to be liable—Ss. 69 and 70, Contract Act.*

Where, notwithstanding the protest of the plaintiffs that the outstandings of a deceased person had not come to them, but had been bequeathed under his will to the defendants, the income tax authorities collected assessment from them in respect of that amount, and the plaintiffs consequently sued to recover the same from the defendants, under Ss 69 and 70 of the Indian Contract Act.

Held, that the plaintiffs were not entitled so to recover, and that Ss. 69 and 70 of the Contract Act were inapplicable, as the Collector had not determined, under S 14 of the Income Tax Act of 1886, that the defendants were chargeable under Part IV, or assessed them at any amount, as it was from the plaintiffs themselves that payment was demanded and enforced by the income tax authorities, and as it cannot be said to have been made by the plaintiffs for the defendants, merely because the income tax authorities ought to have demanded and exacted payment from the defendants instead of from the plaintiffs. **Raghavan, Minor, by guardian Sankara Sastriar v. Alamelu Ammal and another**, 3 M. L. T. 111 = 31 M. 35.

WALLIS and MILLER, JJ.

- (2) S. 14, 26 and 38—Statement before Income Tax Collector, not governed by S. 123 or S. 124 of the Evidence Act. See EVIDENCE ACT, No. 35, 4 M. L. T. 317.

(3) S. 26—See No. 2, *supra*.

(4) S. 38—See No. 2, *supra*.

Act VII of 1887 (Suits Valuation)

(1) S. 3 (1), rule under—Garden land assessed to revenue—Fruit garden—Court fee—See COURT FEES ACT, No. 6, 61 P. L. R. 1908.

1.—Imperial Acts—(Continued).**Act VII of 1887 (Suits Valuation)—(Concl'd.).**

- (2) *S. 8—Value of a suit for redemption—Market value—Principal amount—Appeal from an order of Subordinate Judge.*

The value of the subject matter of the suit in a redemption suit is not the market value of the property but the amount of the mortgage money. In a suit for redemption where the principal amount of mortgage was Rs.1,000, *held* that the suit was cognizable by a Munsif and an appeal lay to the District Judge from an order of the subordinate Judge returning a plaint for presentation to the proper Court. Section 8 of the Suits Valuation Act does not affect the law laid down in (a). **Kedar Singh v. Matabadal Singh**, 5 A. L. J. 713.

AIKMAN and KARAMAT HUSAIN, JJ.

References — (a) 5 A. 332 and 8 A. 438.

(3)—See VALUATION OF SUITS.

Act IX of 1887 (Provincial Small Cause Courts).

- (1) *S. 25—Revision—Powers of High Court—Civ. Pro. Code (Act XIV of 1882), Ss. 108 and 622—Setting aside ex parte decree—Condition precedent.*

The powers of revision given to the High Court by S. 25, Small Cause Court Act are more extensive than those exercised by that Court under S. 622, Civ. Pro. Code (a).

The deposit of the decretal amount or the furnishing of the security is a condition precedent to the setting aside of an *ex parte* decree. Where none of these essentials has been complied with, the Court is bound to dismiss the application. The defect is not cured by subsequently depositing the decretal amount (b). **Nanhe Mal v. Hajas**, 5 A. L. J. 295—A. W. N. (1908), 141.

KARAMAT HUSAIN, J.

References — (a) A. W. N. (1907) 227 and 21 A. 89, R.; and (b) 3 A. L. J. 318, F.

- (2) Ss. 27 and 35—Decree passed by Small Cause Courts—attachment and sale of immovable property—Decree sent for execution to Munsif—Appeal—Case where S. 27, Small Cause Courts Act, does not apply. See CIV. PRO. CODE, No. 119, 5 A. L. J. 612.

- (3) *S. 31—Suit for a share of mesne profits, whether cognizable by Court of Small Causes.*

Under S. 31, of Sch. II of Act IX of 1887, a suit for the profits of immovable property belonging to a person, which have been wrongfully

DIGEST OF CASES.

I.—Imperial Acts—(Continued).

Act IX of 1887 (Provincial Small Cause Courts)—(Continued).

received by another, is exempted from the cognizance of a Court of Small Causes.

Thus, where a plaintiff alleges that the defendant had wrongfully received the plaintiff's share of the profits of immovable property, the suit falls under Art. 31, Sch. II of Act IX of 1887, and as such is not cognizable by a Court of Small Causes. **Venkoba Rao v. Muthu Aiyar**, 18 M. L. J. 88.

MUNRO, J.

Reference.—17 B. 40, R.

(3-a) S. 35—See No. 2, *supra*.

(4) Sch. I, Art. 31—Suit to recover value of plaintiff's share in produce of lauds belonging to him and defendant jointly—Denial by defendant in written statement—Question of title arose only incidentally—Suit cognizable by Court of Small Causes—No second appeal. See Civ. Pro. Code, No. 210, 10 Bom. L. R. 752.

(5) *Provincial Small Cause Courts Act (IX of 1887), Sch. II, cl. 8*,—“Judge of the Court of Small Causes,” meaning of, if it means and includes Munsiffs and other Judicial Officers vested with Small Cause Court powers.

The expression, “the Judge of the Court of Small Causes” in cl. (8), Sch. II of the Provincial Small Cause Courts Act, must be taken to apply either to the Judge of the Court of Small Causes constituted under the Act or of a Court invested with the jurisdiction of a Court of Small Causes.

Where, therefore, the Local Government purporting to act under cl. (8), Sch. II of the Provincial Small Cause Courts Act, by a notification in the Official Gazette, invested in general terms the Munsiffs of a certain place, with authority to exercise jurisdiction with respect to suits for the recovery of rent of homestead lands up to a certain value, and empowered such Munsiffs to try such suits under the Small Cause Court Procedure, such Munsiffs, if invested with the jurisdiction of a Court of Small Causes, are competent to entertain and try such suits as Court of Small Causes. **Akhaya Kumar Saha v. Hira Lal Dosadh**, 7 C. L. J. 407=35 C. 677.

BRETT and DOSS, JJ.

(6) *Sch. II, Art. 18—Suit to recover movable property or its value deposited for safe custody—Suit relating to trust—Jurisdiction of Small Cause Court.*

I.—Imperial Acts—(Continued).

Act IX of 1887 (Provincial Small Cause Courts)—(Concluded).

A suit for the recovery of movable property alleged to have been deposited for safe custody with the defendants, or its value, is not one “relating to a trust” within the meaning of Art. 18 of Sch. II of the Provincial Small Cause Courts Act; and such a suit is cognizable by a Small Cause Court. **Kartar Devi v. Surasti**, 9 P. R. 1908=28 P. W. R. 1908—98 P. L. R. 1908.

SHAH DIN, J.

(7) *Sch. II, Art. 35, cl. (g)—Suit for recovery of money advanced, on a breach of contract of marriage.*

A suit to recover money and ornaments which have been given to the defendant to expend on his daughter, after a breach of a betrothal contract, falls within Sch. II, Art. 35, cl. (g). **Abdullah Y. Ladha**, 2 Sind L. R. 31.

PIATT, J.C., & HAYWARD, A.J.C.

Act V of 1888 (Inventions and Designs).

(1) S. 4 (9) and (10)—“District” and “District Court,” meanings of—“District Court,” if it includes High Court in its original jurisdiction—S. 29 (2), (3) and (4) bars certain defences to an action—Ss. 30 and 31—Application for a rule to a High Court—Procedure—Intention of Legislature.

The expression “District Court,” as used in S. 29 (1) of the Inventions and Designs Act (Act V of 1888), includes a High Court in the exercise of its Ordinary Original Civil Jurisdiction, under S. 4 (1) of that Act.

The Legislature intended that objections indicated in S. 29 (2), (3) and (4) should not be allowed to be raised in defence to an action for the infringement of an exclusive privilege acquired under Part I of the Act, but must be raised under the provisions of Ss. 30 and 31 of the Act, by applying to a High Court for a rule to show cause why the Court should not declare that the exclusive privilege so acquired had not been so acquired, by reason of the objections mentioned in the two latter sections. **Kedarnath Mondal v. Gonesh Chundra Adak**, 12 C. W. N. 446.

FLETCHER, J.

Act VII of 1889 (Succession Certificate).

(1) Right of sister's daughter and sister's daughter's son to claim certificate under Act—See HINDU LAW (SUCCESSION), No. 3, 12 C. W. N. 453.

I.—Imperial Acts—(Continued).**Act VII of 1889 (Succession Certificate)**
—(Continued).

Ss. 3 and 19—Agent to the Governor at Vizagapatam—General Clauses Act, 1868, S. 2 (12)—Appeal from his order as from an order of District Court—Madras Act XXIV of 1839.

Under S. 3 of Act XXIV of 1839 and Rule X, Cl. 4, of the Rules framed pursuant to that Act, the Agent to the Governor at Vizagapatam is the Judge of the Principal Civil Court of Original Jurisdiction in the Agency of Vizagapatam. In S. 2 (12) of the General Clauses Act, 1868, which was in force when the Succession Certificate Act was passed, "District Judge" is defined as the Judge of the Principal Civil Court of Original Jurisdiction. The Succession Certificate Act, in S. 3, defines the District Court as a Court presided over by a District Judge. The Agent's Court is, therefore, a District Court, and an appeal lies, therefore, under S. 19, Succession Certificate Act, from his order as from an order of District Court. **Guruvaram v. Gopinatha Tripathi**, 8 M. L. J. 252.

WALLIS and MUNRO, JJ.

Reference.—18 M. 227, D.

(3) *S. 4—Joint decree-holders, right to execute a decree passed in favour of—Execution of decree by a survivor of two joint decree-holders—Heir of a decree-holder, right of, to execute a decree.*

Two decree-holders were awarded certain sums under a decree jointly and certain other sums severally. One of the decree-holders died and the other claimed to execute the whole decree because she was the survivor of the joint decree-holders and because she was the heir of the other decree-holder, and that she could do so without producing Succession Certificate.

Held, that, so far as the sums awarded jointly were concerned, the surviving decree-holder could execute the decree, but she could not be allowed to execute it with respect to the sums awarded severally without the production of a Succession Certificate. **Rai Jagatpal Singh v. Thakurain Bilas Kunwar**, 10 O. C. 378.

CHAMBER and GRIFFIN, J. CS.

References.—(a) 26 C. 839, 16 A. 259, R.

(4) *S. 4—Application by heir of mortgagee for supplemental decree—Succession Certificate if necessary—"Debt"—Transfer of Property Act (IV of 1882), S. 90.*

I.—Imperial Acts—(Continued).**Act VII of 1889 (Succession Certificate)**
—(Continued).

Where after a preliminary decree had been made in a mortgage suit, the mortgagee died, and his sons got themselves substituted on the record, and an order absolute was made in their favour, but the proceeds of the sale of the mortgaged property proving insufficient, they applied for a personal decree for the balance under S. 90, Transfer of Property Act.

Held, (on a review of the authorities), that, until the applicants obtained a certificate under the Succession Certificate Act, no such decree could be made in their favour. **Sahadav Sukul v. Sheikh Sakhawat Hossein**, 12 C. W. N. 145 = 7 C. L. J. 658.

MOOKERJEE and CASPERSZ, JJ.

(5) *S. 4—Suit for recovery of dower by heirs of deceased wife against husband—Whether plaintiff entitled to decree without certificate required by Act. See MAHOMEDAN LAW (DOWER), No. 1, A. W. N. (1908), 113.*

(6) *S. 4—Certificate not granted to mortgagee's representative—Court cannot pass any decree under S. 90, Transfer of Property Act, in favour of mortgagee's representative, in suit to enforce mortgage—Subsequent grant of certificate not sufficient—See TRANSFER OF PROPERTY ACT, No. 6, 35 C. 767.*

(7) *S. 19—Agent to the Governor at Vizagapatam—Appeal—District Court.*

Under S. 19 of the Succession Certificate Act, an appeal lies from the order of the Court of the Agent to the Governor at Vizagapatam as from an order of a District Court, which the Agent's Court is (a). **Babubalendrani Guruvaram v. Babubalendrani Chandrasakra Raju**, 3 M. L. T. 264. = 31 M. 362.

WALLIS & MUNRO, JJ.

Reference.—(a) 18 M. 227, Diss.

(7-a) *S. 19—Conditional order for grant of succession certificate, whether appealable.*

An order granting a succession certificate, though coupled with a condition that the applicant must give security, is an order granting a certificate and is appealable under S. 19 of the Act. **Biri v. Barkhurdar**, 139 P. R. 1908.

RATTIGAN & LAL CHAND, JJ.

References.—25 C. 320, F. 5 M. L. J. 28, 20 M. 442, 2 A. L. J. 606, R. 13 A. 214, 26 A. 178, 19 B. 790, D.

(8) *S. 19—See No. 2, supra.*

I.—Imperial Acts—(Continued).**Act X of 1889 (Ports).**

- (1) *S. 6*—*Rule of the Karachi Ports Rules—Legality of the rule—Power of port authorities to order vessel to leave port summarily—Malicious prosecution, suit for damages caused by—Want of probable and reasonable cause—Malicious intention.*

The public have, at common Law, a right of navigation in all tidal navigable rivers. It follows that the public have a right to keep their vessels for a reasonable time, for the purposes of trade and commerce, in the Port of Karachi, and such right can only be restricted by express provisions of the Legislature.

There are express provisions in Cl. (a) of S. 6 of the Ports Act X of 1889, for imposing conditions on entering and leaving the Port, and in Cl. (b), for regulating the berths and anchorages to be occupied while in port, but, there are no express provisions in either of these clauses for curtailing summarily the time during which vessels may be kept in the port, nor are there any such provisions in any other section of the Act.

Rule 5, framed under S. 6 of the Act, only indicates that a vessel must either accept the berth assigned to it or go. It does not mean that a vessel which has accepted a berth can summarily be ordered to leave the Port.

An order of the Port officers, requiring the master of a vessel to sail within a certain time, which amounts to an order to leave the Port, is an order *ultra vires* of the rule under which it is purported to be made, or the rule itself is *ultra vires* of the section under which it was made.

A prosecution instituted by the Port authorities for disobedience of such an order is one instituted without reasonable and probable cause.

But the absence of reasonable and probable cause is not alone sufficient to justify the inference that the Port authorities were actuated by malice.

In order to constitute malicious prosecution, it is not only necessary that the prosecution must be filed without reasonable and probable cause, but, also, there must be a malicious intention super-added to it. *The Knight Steamship Company, Ltd. v. The Karachi Port Trust*, 1 S. L. R. 201.

HAYWARD, J.

I.—Imperial Acts—(Continued).**Act VIII of 1890 (Guardians and Wards).**

- (1) *Ss. 11 (1), 13, 17 & 46—Rival claimants for guardianship—Arbitration—Power to refer dispute to arbitration—Code of Civil procedure (Act XIV of 1882), S. 647.*

Per Curiam—Rival claimants to be appointed as the guardian of a minor are not in the position of ordinary litigants and cannot refer the matter in dispute to arbitration. Nor is any such power given to the Judge in the Guardian and Wards Act. The guiding principle, in appointing a guardian, is the consideration what is best for the welfare of a minor.

Per Karamat Husain, J.—S. 647 of the Code of Civil Procedure deals with procedure and procedure alone and does not touch the substantive law of arbitration. The consent of parties in a proceeding for the appointment of a guardian does not give the Judge any power to refer the matter to arbitration. *Mahadeo Prasad v. Bindeshari Prasad*, 5 A. L. J. 101 = A. W. N. (1908), 51 = 3 M. L. T. 203 = 30 A. 187.

AIKMAN and KARAMAT HUSAIN, JJ.

(1-a) S. 13—See No 1, *supra*.

- (2) *S. 17—Hindu Law—Minors—Appointment of guardians.*

Matters to be considered by the Court in appointing a guardian under S. 17 of the Guardian and Wards Act, 1890, viz., the legal right to be appointed a guardian, the preference of the minors and the existing or previous relations, are very minor considerations as compared with the main question what order would be for the welfare of the minor.

In making orders appointing guardians for the persons of minors, the most paramount consideration for the Judge ought to be—What order under the circumstances of the case would be best for securing the welfare and happiness of the minors? With whom will they be happy? Who is most likely to contribute to their well being and look after their health and comfort? Who is likely to bring up and educate the minors in the manner in which they would have been brought up by the parents if they had been alive? In fact, the main question for the Court to consider in the case of the unfortunate minors who have lost their natural guardian is, whom, amongst the relations, or for the matter of that, friends of the minors, can you select who will supply as nearly as possible the place of their lost parent or parents? The interest, well-being and happiness

I.—Imperial Acts—(Continued).**Act VIII of 1890 (Guardian and Wards)—
(Continued).**

of the minors ought to be the main and paramount consideration for the Court in selecting the guardian of the person of minor. *Re Guardian and Wards Act. Re Goolbal and Lilbal*, 9 Bom. L. R. 923=32 B. 50.

DAVAR, J.

(3) S. 17—Mahomedan Law—Guardianship of property of minors—Mother and paternal uncle—Preference—Duty of Court to decide what appears to be for the welfare of the minor. See MAHOMEDAN LAW (GUARDIANSHIP), No. 1, U. B. R. (1908), 2nd Quarter, Guardian and Wards, p. f.

(3-a) S. 17—See No. 1, *supra*.

(4) Ss. 25, 39 and 47—District Judge's incompetency to supersede his predecessor's order appointing guardian—Removal of guardian—Maintenance—Marriage—Appeal. See GUARDIAN AND MINOR, No. 7, 150 P. W. R. 1908.

(4-a) S. 28—See No. 8, *infra*.

(5) Ss. 28, 29 and 47—Permission to transfer, order granting—Appeal against order granting permission to transfer.

Held, that no appeal lies against an order of a District Judge sanctioning a mortgage in favour of a particular person in preference to another person. Such an order cannot be treated as an order refusing sanction to mortgage. **Musammatt Shiam Kunwar and another v. Shiam Lal**, 11 O. C. 29.

CHAMIER, J. C.

(6) S. 29—Compromise—Court's duty in granting leave to compromise by certificated guardian—Review—Sug to set aside decree, if maintainable. See CIV. PRO. CODE, No 259, 8 C. L. J. 266.

(6-a) S. 29—See No. 5, *supra*.

(7) Ss. 29 and 31—Guardian and minor—Mortgage of minor's property to secure a loan sanctioned by the Court—Interest.

In all cases where sanction is given for the raising of loans on the security of the property of minors, it is the duty of the Judge granting sanction to specify in his order of sanction not only the amount to be raised and the property to be mortgaged, but also the rate of interest, or at least the maximum rate of interest, at which the loans are to be raised. If nothing is said as to the rate of interest, the lenders are

I.—Imperial Acts—(Continued).**Act VIII of 1890 (Guardian and Wards)—
(Concluded).**

entitled only to a reasonable rate of interest on the moneys advanced. **Thakur Prasad v. Gauripat Rai**, A. W. N. (1908); 75=5 A. L. J. 260=30 A. 188.

BANERJEE and RICHARDS, JJ.

Reference :—11 C. 379, F.

(7-a) S. 31—See No. 7, *supra*.

(8) Ss. 34, 7 (3), 28—Appointment of testamentary guardian by Court—His liability to furnish security.

A guardian under a will, who has also applied for and accepted the position of a guardian under the Act, may be called upon to furnish security under S. 34 of the Act. **Sukh Dial v. Karam Chand**, 99 P. R. 1908.

CHATTERJI, J.

(9.) S. 35—Surety of guardian—Liability, whether extends to guardian's dealings with properties other than those specified in the application for appointment of guardian—Assignment of guardian's bond, if must be in writing—See GUARDIAN AND MINOR, No. 3, 12 C. W. N. 481.

(10) S. 39—See No. 4, *supra*.

(11) S. 46—See No. 1, *supra*.

(12) S. 47—See No. 4 and 5, *supra*.

Act IX of 1890 (Railways).

(1) Ss. 47, 54, 72, 77 and 140—Non-delivery of goods—Condition in the receipt that notice of description and contents of missing article should be given to District Traffic Superintendent—Validity.

Claim for damages for non-delivery of goods against a Railway Company is a claim under Act IX of 1890, (a).

A condition in a railway receipt that all claims against the railway company for loss or damage to goods must be made to the clerk in charge of the station to which they have been booked before delivery is taken, and that a written statement of the description and contents of the article missed or of the damage received, must be sent forthwith to the Traffic Superintendent of the District in which the forwarding or receiving station is situated, and that, otherwise, the railway company will be freed from responsibility, is, although a rule or a bye-law which is duly sanctioned by the Governor-General in Council, and published in the Gazette, *ultra vires*, as such a condition, on

1.—*Imperial Acts*—(Continued).**Act IX of 1890 (Railways)**—(Continued).

a comparison of Ss. 54, Cl. 1 and 77, is inconsistent with the Act. Under the Act itself the only condition precedent to the successful claiming of compensation for loss of goods made over to a railway for carriage, is a written submission of claim within six months of delivery to the railway. The condition imposed by the bye law, viz., that a person claiming compensation for loss of goods made over to the railway cannot get any compensation unless he has forthwith, i.e., immediately upon the loss, sent a detailed list of the contents, etc., to the District Traffic Superintendent, amounts to a repeal of S. 77 and the substitution of an inconsistent provision in its place. Under S. 54 (1) the conditions that may be imposed by a bye-law are conditions with respect to the "receiving" forwarding or delivering" of articles. It cannot be said that a bye-law prescribing what the consignor or consignee is to do after the goods are lost comes within these words (b). **Azizul Rahman v. The Bombay-Baroda and Central India Railway Company**, 76 P. R. 1908 = 139 P. W. R. 1908.

JOHNSTONE and LAL CHAND, JJ.

References:—(a) 6 P. R. 1897 and 108 P. R. 1906, (F.B.) D; and (b) 31 C. 951, F; 26 B. 669, D; 22 M. 137 and 24 C. 306, It.

(1-a) S. 54—See No. 1, *supra*.

(1-b) S. 72—See No. 1, *supra*.

(2) S. 72 (2)—*Railway Company—Liability as carriers—Risk note, Form B.*

Where the plaintiff company delivered 138 bags of flour to be carried from Delhi to Secunderabad by the defendant Railway Company, and executed a written agreement with the defendant company, in the form of risk note B under S. 72 (2) (b) of Act IX of 1890, "paying a reduced rate for the conveyance and also with the knowledge of their accredited agent that the bags were conveyed in open wagons, it was held that an agreement in Form B relieves the Railway Company from liability in respect of any claim for compensation, no matter how the loss, destruction, deterioration or damage was caused, and the mere fact that such loss, etc., was due to the goods being negligently loaded in open wagons does not affect the question. **Ganesh flour Mills Company, Ltd., Delhi v. The Great Indian**

1.—*Imperial Acts*—(Continued).**Act IX of 1890 (Railways)**—(Continued).

Peninsular Railway Company, Bombay, 118 P. R. 1908.

RATTIGAN, J.

References.—10 C. 210; 17 B. 417; 19 B. 159; 18 A. 42, 30 C. 257, 14 M. L. J. 396.

(3) Ss. 72, 74 and 75 (1)—*Company's liability for loss of passenger's luggage.*

A railway passenger, whose box, containing cloths, gold and silver ornaments and currency notes of the value of over Rs. 100, has been entrusted to the Railway Company's servants, for conveyance in the luggage van, and has been lost or stolen, cannot recover the value of the box or of any part of its contents from the Company, unless he had made the declaration prescribed by S. 75 (1) of the Act. The words "any parcel or package" in S. 75 (1) include passenger's "luggage" dealt with by S. 74 of the Act. Cl. (b) of the second schedule of the Act covers currency notes. **Alwas v. Simla-Kalka Railway Company**, 73 P. R. 1907 = 15 P. L. R. 1908.

REID, J.

Reference—56 P. R. 1897, R.

(3-a) S. 74—See No. 3, *supra*.

(3-b) S. 75 (1)—See No. 3, *supra*.

(3-c) S. 77,—See No. 1, *supra*.

(4) Ss. 77 and 140—*Claim for compensation for short delivery—Notice of claim on whom to be served—Service on Traffic Manager.*

The notice of claim under S. 77, Railways Act, must be served under S. 140 of the Act on the Agent of the Company. But the law does not require that the notice should be physically thrust in the Agent's hand. It is sufficient if it appears from the findings that the Agent has had full knowledge and notice of the claim.

Where from the Rules of the Railway Company it appeared that the Traffic Manager in the Claims department settles all such claims and the Agent also refers to him claims for disposal.

held, that the notice to the Traffic Manager was sufficient. **y. Woods v. Meher Ali Bepari**, 13 C. W. N. 24 = 4 M. L. T. 427.

HOLMWOOD and SHARFUDDIN, JJ.

1.—*Imperial Acts*—(Continued).**Act IX of 1890 (Railways)**—(Concluded).

- (5) S. 140—"May" means "must"—Notice of claim under S. 77 on whom to be served—Service on Traffic Manager insufficient.

The word, "may" in S. 140 of the Railways Act means "must," and a notice of claim under S. 77 of the Act for short delivery of goods must be served, when the railway is administered by a Railway Company, on the Agent, in India, of the Railway company (a).

Service of notice on the Traffic Manager was insufficient. **Nadir Chand Shaha v Mr. Wood** 12 C. W. N. 450, = 35 C. 194

MITRA and CASPERSZ, JJ

References.—(a) 26 B. 669. 24 C. 306, 28 A. 552, approved and 22 M. 157, disapproved.

- (6) S. 140—See Nos. 1 and 4, *supra*.

Act IV of 1893 (Partition).

- (1) S. 2—Decree for partition—Power of Court to order sale instead of division

S. 2 of the Partition Act, which gives the Court power to order sale instead of division in partition suits, applies equally, where the Court has to pass a decree in a suit for partition, as also, where the Court has already passed a decree directing partition in a particular mode, and the mode becomes impracticable or inexpedient. **Bai Hirakore v. Trikamdas Hirachand**, 10 Bom. L. R. 23 = 3 M. L. T. 141 = 32 B. 103.

CHANDAVARKAR and LEATON, JJ.

References.—24 M. 639 and 5 C. W. N. 128, F.

- (2) S. 4—Act IV of 1882 (Transfer of Property Act), S. 44—"Undivided family"—S. 4 of Partition Act applicable to Muhammadans.

Held that Muhammadans are not excluded from the benefit of S. 4 of the Partition Act, Act No. IV of 1893 (a). **Sultan Begam and others v. Debi Parsad**, A. W. N. (1908) 126 = 5 A. L. J. 352 = 4 M. L. T. 38 = 30 A. 324.

STANLEY, C.J., and BURKITT, J.

References.—(a) 40 O. C. 158, approved, 13 A. 282, referred to, and 29 A. 308, overruled.

- (3) S. 4—Decree for possession—Right of a member of joint family to buy out the plaintiff—See Civ. Pro. Code, No. 219, 7 C. L. J. 98.

Act I of 1894 (Land Acquisition).

- (1) Land Acquisition Act—Fishery right—Land—What is to be acquired—Reference bad—Court, duty of.

1.—*Imperial Acts*—(Continued).**Act I of 1894 (Land Acquisition)**—(Continued).

Fishery rights are not land within the meaning of the Land Acquisition Act.

What is to be acquired in every case under the Act is the aggregate of rights in the land, and not merely some subsidiary right as fishery right.

It is the duty of the Civil Court to set aside proceedings of, and a reference by, the Collector, which are bad, being contrary to the provisions of the Act (a) **Raja Shyam Chandra. Mardaraj Harichandan Raj Narain Das v. The Secretary of state for India in Council**, 7 C. L. J. 445 = 12 C. W. N. 569 = 35 C. 525.

RAMINI and SHARFUDDIN, JJ.

References.—(a) 4 C. L. J. 256 (258) and 13 B. 650, referred to.

- (2) Declaration—Land actually required not mentioned—Reference to Civil Court.

When land actually taken up by Government is different from that mentioned in the declaration issued under the Land Acquisition Act, the proceedings of the Collector are void, and there can be no valid reference to the Civil Court. **Gajendra Shau v. The Secretary of State for India in Council**, 8 C. L. J. 39.

RAMPINI and SHARFUDDIN, JJ.

- (3) Compensation—Modes of ascertaining compensation—Surveyor's opinion—Practice as to surveyor's evidence—Value of frontage land bears proportion to its depth—Relative values of each—Hypothetical scheme, Value of, in determining compensation—Value of the whole, how derived from value of part—Collector's award when disturbed.

In cases where the valuation cannot be based on what the property is producing at the time of the notice nor are there any recent sales of the land to guide the Court, the market value must be determined by sale of similar land in the neighbourhood.

The owner in claiming compensation can seek to prove either what the plot would fetch if sold in one block or what the present value is if he plotted out the property and sold it in lots.

In arriving at the valuation, the Court can, in addition to the evidence of sales, be guided by the opinions of surveyors, though it is necessary to distinguish opinion from argument.

The practice which has grown up in references under the Land Acquisition Act, 1894, of surveyors making long reports and furnishing

I.—Imperial Acts—(Continued).**Act I of 1894 (Land Acquisition)—(Continued).**

copies to the opposite side before hand is open to grave objection. A surveyor's opinion by itself is good evidence. What value the Court will put on it depends entirely on the effect of the cross-examination, but there is no reason why the witness should himself provide the materials for his cross-examination. It will save the time of the Court if a surveyor prepares a concise description of the property to be valued; but he need not add anything more except his opinion of the value, and if he does give his reasons they must be based on facts and not on hypothesis.

When determining the value of frontage land the depth is a question of supreme importance. What is a suitable depth must primarily depend on the character of the buildings in the locality.

The value of a building frontage must depend on the higher rents that can be obtained for the shops or rooms facing the street and as the proportion of these rents to the lower rents of the back rooms decreases so does the value of the frontage land decrease.

It cannot be too clearly laid down that under ordinary circumstances the value of an income producing property depends on its income irrespective of its costs, and that capital when once invested in land and buildings cannot be apportioned between them so as to give the market value of each.

It cannot be taken as a hard and fast rule that back land must be worth half the frontage land.

Evidence of hypothetical building schemes, is irrelevant to the question of finding the market value of land. It is difficult to suppress the belief that seems to exist almost universally amongst surveyors in Bombay that market value can be ascertained in this way. The belief that an hypothetical scheme can be a guide to market values ascertained by other means is equally fallacious.

In valuing the land as a whole it would not be correct to add up the retail values of the parts as derived from the instances of sales of small plots without making some deduction both on general principles and because the wastage must be greater than in those instances from which the retail values have been deduced.

I.—Imperial Acts—(Continued).**Act I of 1894 (Land Acquisition)—(Continued).**

The Court would be slow to differ from the Collector's offer on a matter of a few rupees except for very strong reasons such as an error or a question of principle. **Government of Bombay v. Karim Tar Mahomed**, 10 Bom. L R. 660.

MACLEOD, J.

(3-a) *Compensation for land acquired—Principles for fixing the compensation—Potential value, how far a determining factor in fixing valuation.*

Land in the neighbourhood of a town always has a potential value. It will not compare with land within the limits of the town but if placed in the market purchasers will always be found at a higher rate than one based on its existing use.

Future utility is a thing that people have an eye to in buying land, and the market price of the land is affected by it. Such future utility must be estimated by prudent business calculations and not by mere speculation and impractical imagination (a).

The method of fixing a price for the improved value of the land according to the expected user and making deductions to ascertain the present value, should only be adopted when the expected user is immediately available and is so obvious that its present value can be ascertained, as for instance, in the case of a piece of vacant land in the midst of a building area.

The other method is to assess to the best of one's ability the value of the potentialities attaching to the land in question in the light of the evidence adduced regarding sales in the neighbourhood and expert opinion as to the value of the land as it stands.

When considering the potentialities it must be remembered that that involves an entirely different user to the present. No doubt different kinds of land must be differently valued, and the valuation must also vary according to advantage or disadvantage as regards communications, but such questions must be dealt with in relation to future utility. The whole area possesses the same potentialities, only in a varying degree, and the claimant is entitled to have included in the market price of his land such speculative advance therein as has already taken place in consequence of the improved prospects of the locality (b).

I.—Imperial Acts—(Continued).**Act I of 1894 (Land Acquisition)—(Continued).**

If it is shown that a person has paid a certain price for a block of neighbouring land similarly situated and possessing similar advantages, with a view to some profitable disposition thereof, there is no reason why another block of land the subject of acquisition should not be similarly valued. The probability of a person purchasing the land for a similar purpose is an element for consideration, if the probability is not so remote that it ought to be held to be purely speculative, so that other things being equal, of two blocks of land, the block under acquisition should be taken to be of equal market value with the other block (c).

Where there are several adjoining blocks of land with a potential value for a certain purpose, each block should be valued as having such a potential value, though the enhancement may not be the same in each case. The principle is the same whether the blocks are many or few.

There are two guides to assessing the value of potentialities—(1) the opinion of experts, (2) evidence of the value the purchasing public has put upon them within a reasonable period prior to the date of acquisition.

In cases under the Land Acquisition Act the tendency is for the Courts to rely far more on evidence of sales than on expert opinion.

A claimant is entitled to the benefit of a good bargain he has been able to make before the land was notified provided he can prove its present value with a reasonable degree of accuracy, but this cannot be done by merely suggesting that within ten or twenty years the land will increase in value. That is a question of chance. **Dorabji Cursetji Shroff**, *In re*, 10 Bom. L. R. 675.

MACLEOD, J.

References—(a) 32 C. 348, *P* (b) 28 I. A. 121, *F*. (c) 34 C. 704 *P*.

(4) *Acquisition of land Compensation—Principles governing the ascertainment—Hypothetical method of development—Method of ascertaining the price by values realized by sales of neighbouring lands—Assessment on the principle of small building plots—Allowance for road way.*

The Court, before interfering with the award by the Tribunal of appeal, must be clearly satisfied that it is not substantially erroneous.

I.—Imperial Acts—(Continued).**Act I of 1894 (Land Acquisition)—(Continued).**

The method of hypothetical development cannot be objected to on the ground that it involves or pre-supposes the intermediation of a third person—a speculator or exploiter, that is to say, a person who purchases the land wholesale from the claimant in order afterwards to sell it retail for building purposes. The value of the land to the owner is what must be regarded, and that is the price which it will fetch if disposed of on the most profitable terms. The owner is not to be deprived of the most advantageous way of selling his land by reason of the fact that it is subject to immediate acquisition.

In the sale of the land in building sites is impossible except through the speculator, then no doubt allowance will have to be made for the profits, costs and other charges of the speculator. But the claimant is not to be debited with these expenses unless the introduction of the speculator is a commercial necessity. And there is no necessary reason why the claimants should be driven to have recourse to the speculator for a business which he can do for himself.

Where the compensation is assessed on the general principle of a sale of the land split up into parcels suitable for building, it appears not only unnecessary but inappropriate to make a special deduction on account of the small area marked off for the road-way.

Where the method of hypothetical development is employed in conjunction with the method of ascertaining the present value of the land by reference to the prices realized by the sale of neighbouring lands, and the consequence is that these two methods lead to very much the same result, it follows not only that that result is entitled to so much the greater degree of confidence, but also that the method of hypothetical development itself is corroborated.

In the method of ascertaining the present value of land by reference to the prices realized by the sale of neighbouring lands, it is plain that no evidence of former sales can be obtained which shall be precisely parallel in all its circumstances to the sale of the particular land in question. Differences small or great exist in various conditions, and what precise allowance shall be made for these differences is not a matter which can be reduced to any

1.—*Imperial Acts*—(Continued).

Act I of 1894 (Land Acquisition)—(Continued).

hard and fast law. **Trustees for the Improvement of the City of Bombay v. Karsondas Nathu**, 10 Bom. L. R. 688

BATCHULOR and CHAUBAL, JJ.

(5) *Acquisition of land—Valuation—Potentialities, value of—Allowance for means of access, in valuation.*

Although land may possess certain potentialities, it does not follow that those potentialities have any present value.

When valuing land in the rough it is not right to lay too great a stress on its existing position and means of access as they may be entirely altered when the opportunity comes to bring the land into use. **Sorabji Jamsetji Tata, In re**, 10 Bom. L. R. 696.

MACLEOD, J.

(6) *Valuation of land—Hypothetical method—Method of fixing valuation*

The hypothetical method of valuation when carefully analysed shows that it is a mere delusion to consider that one arrives at the market value of a large area of land by means of an hypothetical building scheme. The principal ingredient in such a scheme is the gross rent expected to be obtainable from the buildings it is imagined will be erected on the land, and it is imagined that the value of the land can be arrived at by making certain deductions from the gross rent.

The main question in dealing with the valuation of land is whether it can in general be put to some profitable use, such as is adapted to the locality in which the land is situated. It is wrong to attempt to go further into the future and estimate the exact use to which the land may be put and the profit to be derived therefrom. Such calculations must be purely hypothetical and cannot possibly be based on ascertained facts.

There are only two ways in which a large area of land under acquisition can be valued (1) By determining its value as a whole as it existed at the date of the notification, (2) by ascertaining its then value on the basis of its being laid out for sale in building plots. The latter, however, is open to the objection that it may be too artificial, but there is no doubt that it is a well established method of valuation.

1.—*Imperial Acts*—(Continued).

Act I of 1894 (Land Acquisition)—(Continued).

The owner is entitled to rely on the most advantageous way of realizing the value of his lands, but (1) his calculations must be based on the market value and conditions existing at the date of the notification, (2) the scheme must be capable of being carried out immediately, (3) it must be adapted to the locality.

The valuation must proceed as follows. The amount of building land available for sale after laying out the land must first be ascertained, and then the amount it should realize, from that should be deducted the costs of laying out the grounds and the balance should be written back for half the period allowed for developing and disposing of the property. This will give the theoretical present value of the property to the owner.

The principle of valuation which requires the fewest ingredients is likely to cause the least difference of opinion and to produce the best results. There are six questions to be determined

- (a) the building area,
- (b) the cost of development,
- (c) the value of the building area when laid out for sale,
- (d) the time required for development and disposal,
- (e) the present value of the sale proceeds,
- (f) the deduction to be made for the advantage to the owner of getting cash payment and so being saved the trouble and risk of development.

Any attempt to value land by fixing the proportion the general rent should bear to the rack rent must necessarily fail in Bombay. The use of capital in building and the results to be obtained therefrom vary so enormously according to the land built upon and the capacities and opportunities of individuals, that they cannot be standardized. **Dhanjibhoy Bomanji, In re**, 10 Bom. L. R. 701.

MACLEOD, J.

(7) *Objection—Reference—Party—Jurisdiction of Court*

A Court has no jurisdiction to deal with objections, except those which were made by persons who were parties to the proceedings before the Collector and which brought about

1.—Imperial Acts—(Continued).

Act I of 1894 (Land Acquisition)—(Continued).

the reference. **Muhammad Saff v. Haran Chandra Mukerjee**, 12 C. W. N. 985.

MACLEAN, C. J., and COXE, J.

(8) Objection—Reference—Party—Jurisdiction of Court.

A Court has no jurisdiction to deal with objections, except those which were made by persons who were parties to the proceedings before the Collector and which brought about the reference. **Prabal Chandra Mukherjee v. Raja Peary Mohun Mukherjee**, 12 C. W. N. 987.

MACLEAN, C. J., and DOSS, J.

(9) Ss. 6, 7, 11, 12 and 18—Declaration of intention to acquire notified—Officer appointed to take order for acquisition can enquire through subordinates but must signify acceptance of their report as his award and fully sign it—Valid award must be approved and signed by officer appointed with full official designation—When award deemed to be "made"

Where a declaration is made, under the provisions of Ss. 6 and 7 of the Land Acquisition Act, 1894, and an officer, for instance, the Deputy Commissioner, is directed to take order for the acquisition of the said land, it is competent to the officer, appointed in the Government notification to take order for the acquisition of the property, to direct one of his subordinate officers to make enquiry and to report to him, as this is not a judicial proceeding, and such a procedure would not be illegal. It is possible that the duly authorized officer may, in such cases, adopt his subordinate's report as the award to be made under S. 11. But, in every such case, it is essential that the officer, who has to make the award under his hand, should, by unequivocal words signify that this report was accepted by him as his award, and that his full signature should be appended to this declaration, it is not enough for him to append merely his initials to his endorsement of approval. An award, bearing only his initials, does not conform to the provision of S. 11 and is, therefore, no award at all.

Where a notification issued under Ss. 6 and 7 of the Act, authorized the Deputy Commissioner of Lahore to take order for the acquisition of the property the person authorized to act as the Collector for the purposes of S. 7 of the Act is the Deputy Commissioner of Lahore for the time

1.—Imperial Acts.—(Continued).

Act I of 1894 (Land Acquisition)—(Continued).

being, and that officer, and that officer alone, is competent to make an award under his hand for the purposes of S. 11 of the Act. The provisions of this section require that a certain degree of formality shall attend the making of an award, and an award, which is under the hand of a person other than the person or official authorized to take action under S. 7, cannot be said to be under the hand of the Collector, and this too though the person purporting to make the award states that he is acting for, or on behalf of, the Deputy Commissioner.

Held, also, that an award under the Act is not "made" until it is announced or communicated to the persons interested, as to hold that it is "made," as soon as it is signed by the Collector would, in many cases, result in grave hardship. **Macdonald v. The Secretary of State for India**, 123 P. R. 1908.

RAITIGAN and SHAH DIN, JJ.

(9-a) S. 7—See No. 9, *supra*.

(10) Ss. 9 and 25 (2)—Jurisdiction—Compensation—Award—Powers of land acquisition Judge.

Where no claim pursuant to a notice under S. 9 of the Act was made by a party interested to make a claim,

held—that the land Acquisition Judge, under S. 25, sub-sec. (2), had no power to make an award for an amount exceeding that awarded by the Collector, unless the claimant satisfied him that he had sufficient reason for refraining from making his claim in due time.

The Judge should state his reasons for allowing such a person to prefer his claim. **The Secretary of State for India in Council v. Gobind Lal Bysak**, 12 C. W. N. 263.

R. MEHREZ C. J. and SHAH UDDIN, J.

(10 a) S. 11—See No. 12, *supra* and No. 10, *supra*.

(10-b) S. 12—See No. 9, *supra*.

(10-c) S. 13—See No. 9 *supra*.

(11) S. 18 (1)—Award—Application for reference to the Civil Court—Collector's order refusing—Judicial order—High Court's power to revise.

In rejecting an application made under S. 18 cl. (1) of the Land Acquisition Act, asking for a reference to the Civil Court, the Collector acts judicially, and his order is subject to re-

I.—Imperial Acts—(Continued).

Act I of 1894 (Land Acquisition)—(Continued).
 vision by the High Court. **The Administrator General of Bengal v. The Land Acquisition Collector**, 12 C. W. N. 241.

HENDERSON and MITRA, JJ.

Reference.—9 C. W. N. 454=32 C. 605, R.

(12) Ss. 18 and 50—*Reference before Judge—Parties, when acquisition is for corporation—Appeal by corporation, if lies—Secretary of State for India in Council, if necessary party*

A company or corporation for whose benefit any land may be acquired by the Collector is not a necessary party in a land acquisition proceeding. S. 50 of the Act allows such company or corporation to appear simply for the purpose of watching the proceedings or assisting the Secretary of State.

Such a company or corporation has no power to ask for a reference under S. 18 of the Act, nor has it the right to appeal against the decree made upon a reference.

The Secretary of State for India in Council is directly interested in the ascertainment of the amount of compensation, and no proceeding upon a reference can be valid in his absence. **The Municipal Corporation of Pabna v. Jogendra Narain Raikut**, 13 C. W. N. 116.

MITRA, and CASPIRSZ, JJ.

(18) S. 23—*Compulsory acquisition—Compensation—Market value of land—Passage on the land—Dedication to the public.*

Under S. 23 of the Land Acquisition Act, 1894 the Court has to ascertain the market value of the land, all separate interest being taken to have combined to render the land available for sale in the market.

If the owner of the soil throws open a passage, and neither marks by any visible distinction, that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public. Although the passage is originally intended only for private convenience, the public cannot be excluded from it after being allowed to use it very long without interruption. The fact that the road is is not lighted by any public authority makes no difference (a). **Jalbhoy Ardesir Sett v. Secretary of State for India**, 10 Bom. L. R. 931.

BACHELOR and CHAUEAL, JJ.

Reference.—(a 1 Camp. 260, F.

I.—Imperial Acts—(Continued).

Act I of 1894 (Land Acquisition)—(Continued).

(14) S. 23—*Acquisition of land—Compensation—Market value of land—Methods for ascertaining the value—Hypothetical building scheme, how far a guide in fixing the value of land to be acquired—the scheme rejected as remote and speculative—“Market value” meaning of—Opinion of expert witness as to value—Evidence Act (I of 1872), S. 51—how far expert evidence to be guide—Method of arriving at the value by a speculative purchase—The method not reliable in fixing value of land—Evidence of offers, how far can be helpful in making out the value—Capitalization of ground rent—The limit of years' purchase.*

The Hypothetical building scheme consists in an attempt to value a parcel of land by means of figures based upon the calculated financial result of a notional erection of buildings on the land, and its notional development in the most profitable manner. The land to be assessed is imagined as covered with as many houses or shops of as profitable a character as can be reconciled with existing and presumed future circumstances of demand; then the nett annual returns from these buildings are capitalized and from this figure the calculated cost of construction is deducted; the balance is said to be the prospective value of the land, and from this figure the present value is inferred by deducting various sums on account of loss of interest on capital and so forth.

The scheme depends entirely on the validity of three propositions (a) that the present market value of land can be ascertained by deducting the cost of construction from the capitalized nett annual rental, (b) that the prospective market value of land which is now vacant can be ascertained by deducting the estimated costs of the buildings which, it is supposed, can be erected on the land from the capitalized nett annual rent, which it is estimated such buildings will produce, and (3) that the present market value of the land can be ascertained by making certain deductions from the prospective market value. The first proposition is not true and the remaining two necessarily share the same character. For, the balance remaining after deducting cost of construction of buildings in esse from the capitalized value of actual rents received must be regarded as including builder's profits, which

1.—*Imperial Acts*—(Continued).

Act of 1894 (Land Acquisition)—(Continued).

will depend on the capital; it is therefore an unknown quantity and has no necessary connection with the "market value of the land" which is the figure to be ascertained under S. 23 of the Land Acquisition Act, 1894.

The hypothetical building scheme, considered as evidence, is bad as being too remote, speculative and conjectural.

The "market value of the land" in S. 23 of the Land Acquisition Act, 1894, means simply the price which, at the given time and place, land would fetch on sale according to the then rates of the market, and this value depends on general pre-existing considerations apart from the individual projects of a particular purchaser.

The opinion of an expert witness is admissible in evidence not only when it rests on the personal observation and inquiry of the witness himself or on facts within his knowledge, but also when it is founded on the case as proved by other witnesses at the trial, and under S. 51 of the Evidence Act, when the opinion is admissible the grounds upon which it is based are also admissible. But it is settled law that an expert may not be asked purely speculative hypothetical questions having no foundation in the evidence, in other words, before the expert witness is entitled to give evidence on the hypothesis, a sufficient foundation for it must be laid by due evidence *aliunde* of the facts assumed.

The other method adopted in estimating the value of land to be acquired introduces a speculative purchaser who is supposed to base his offer for the land as a whole on a series of intricate calculations. The land is plotted out into building sites; the amounts these will realize are placed to credit, deductions of every conceivable character are placed to debit and the attenuated balance is considered as the market value of the land. This method also is fallacious. It rests on the assumption that the land to be valued must be valued as a whole and sold as a whole to a single speculative purchaser who, as against the claimant vendor, is entitled to deduct all costs, charges and expenses to which he is put in developing the land. But there is no necessity for assuming the intervention of this costly speculator and no warrant for the consequent serious reductions in the value of the ownership. It is clear that this method, while appearing to concede to the owner the doctrine

1.—*Imperial Acts*—(Continued).

Act of 1894 (Land Acquisition)—(Continued).

of the most profitable user, in fact deprives him of every advantage which he may claim under that doctrine. Its main object appears to be to depreciate the land under acquisition, and for this reason alone it would be opposed to the general principles by which the Court is governed in these cases.

There is no difference between "the value to the owner" which forms the basis of compensation payable under the Land Clauses Act in England and the "market value" of the land under S. 23 of the Land Acquisition Act in India.

To show the market value of the land the claimant can rely on the most advantageous way he can dispose of the land under acquisition and show if he so chose what he could realize by retail sales after making the necessary deductions as appearing from the evidence in the case.

In ascertaining the "market value" of land under the Land Acquisition Act, 1894, too much importance must not be attached to evidence of offers. An offer does not come within the category of sales and purchases. If an offer for the whole or a portion of the land under acquisition is proved, it amounts merely to an expression of opinion on the part of the offeror. But this can only be proved by the evidence of the offeror himself and is then relevant. The evidence of offers made by irresponsible brokers on behalf of undisclosed principals, or perhaps for their own purposes without any principal behind them, is useless, even supposing it is relevant, which is doubtful. The evidence that the owner refused an offer so made through a broker is only evidence that in his opinion his land was worth more than the figure of value named or that the offer was for some other reason of a nature which he was unwilling to accept. Evidence of such offers by brokers for neighbouring land is still less effective. If the offeror himself gives evidence, it is evidence that in his opinion such neighbouring land was of a certain value and such evidence would only be relevant if he had formed an opinion by comparison of the land under acquisition.

In valuing ground by the capitalization of a ground rent, in no case should more than twenty years' purchase be allowed; and in the case of an unsecured ground rent more than 16½

1.—Imperial Acts—(Continued).

Act I of 1894 (Land Acquisition)—(Continued).

years' purchase should not be allowed. **Government of Bombay v. Merwanji Muncherji Cama**, 10 Bom. L. R. 907.

BACHELOR, HEATON and MACLEOD, JJ.

(15) *Ss. 23, 11 and 30—Compulsory acquisition—Land—Market-value—Additional percentage for compulsory acquisition—Land to be acquired must include all interests in the land—Value of tenant's interest has no bearing—Allowance for Government taxes—Apportionment of the compensation money—Offer to be made to the claimants as a body—Questions of title between Government and claimant cannot be tried by Collector*

Under the Land Acquisition Act (I of 1894), S. 23, Sub-S 1, in determining the amount of compensation to be awarded for the land, the Court shall take into consideration first, the market value of the land, to which may be added various other sums for damage and expenses under headings secondly to sixthly in that sub-section. Under Sub-S 2, fifteen per centum for compulsory acquisition are to be added only to the market value of the land, and not to that part of the compensation which may be payable under the other heads. When there are no claims for compensation under these heads, the compensation payable is the market value of the land.

There is no provision in the Land Acquisition Act for the acquisition of anything less than the permanent interest in the land, and 'land' in the Act must mean land irrespective of any interests which have been created in it.

The words "the compensation which should be allowed for the land" in S. 11 of the Act cannot be paraphrased into compensation for those interests in the land which are not vested in Government.

The market-value of land, by which under S. 23 (1) of the Land Acquisition Act the Court is to be guided in fixing the compensation, has nothing to do with the value of the tenants' interest.

Land in Bombay held in perpetuity on payment of a fixed rent to Government is property in the nature of free-hold, and passes from hand to hand without the Government demand influencing the price paid. In such cases the market-value of the free-hold subject to the Government demand can be ascertained from the price paid, and that is the amount of com-

1.—Imperial Acts—(Continued).

Act I of 1894 (Land Acquisition)—(Continued).

pensation to be paid by Government. If the market value has to be ascertained from the income of the land, the Government demand, whether it be called pension tax, quit and ground rent or *Tokla*, provided it is permanent, must be treated as an outgoing before the net income is capitalized. The Government demand is a tax on the land, and not an interest in the land.

When the compensation payable for the land is fixed, the Collector has to apportion it amongst the persons interested, and he has to satisfy himself that the claimant or claimants can produce a *prima facie* title to receive the compensation, and in case of dispute between claimants, he can refer them to the Court under S. 30 of the Land Acquisition Act, 1894.

The Collector's jurisdiction is limited to making an offer of the compensation payable for the land. If there are several claimants, he can apportion the compensation amongst them, but the offer has to be made to the claimants as a body, there is not a separate offer to each claimant of the amount apportioned to him. The term claimant includes a body of claimants in whom are vested all the lesser interests which make up the permanent interest in the land to be acquired.

The Collector has no jurisdiction to try questions of title between Government and the claimant (*a*).

If the Collector proceeds with the inquiry he is directed to make under the Land Acquisition Act, 1894, that amounts to a confession of title in the claimant or claimants, and having arrived at the compensation payable for the land under S. 11 of the Act, he ought, if he makes an offer at all, to offer that to the claimant; he has no right whatever to retain any of it on behalf of Government. *In re, Esufali Salebhai*, 10 Bom. L. R. 994.

MACLEOD, J.

Reference.—(a) 7 A. 87, F.

(16) *Ss. 23 & 33—Acquisition of land—Compensation—Market-value, ascertaining of.*

Where the market-value of the land has to be ascertained for purposes of S. 23 of the Land Acquisition Act, 1894, the Court must proceed upon the assumption that it is the particular piece of land in question that has to be valued including all interests in it.

1.—Imperial Acts—(Continued).

Act I of 1894 (Land Acquisition)—(Continued).

Where land compulsorily acquired is held on *watan* tenure, the money payable in respect of the *watan* holder's interests should be deposited in Court and invested in accordance with the provisions of S. 32 of the Act. **Collector of Belgaum v. Bhimrao Patel**, 10 Bom. L. R. 657.

JENKINS, C. J. and BATCHELOR J.

(16-a) S. 25 (2)—See No. 10, *supra*.

(17) Ss. 25, 27 and 51—Award of costs—Appeal—Civil Rules of Practice or Rules applicable to Presidency Small Cause Court to be applied in calculating *wakil's* fee.

By S. 25, the award is to state the costs incurred, and by S. 54, an appeal lies against any part of the award. So, it is not possible to say that the award of costs is not part of the award and it must be held that an appeal lies.

The effect of S. 27 of the Land Acquisition Act is not to leave the fixing of the amount for the *wakil's* fee in the discretion of the Court. In cases in which proper value can be attached to the suit, the Civil Rules of practice or else the rules applicable to the Presidency Small Cause Court should be applied in calculating the *wakil's* fee. **Ekambara Gramany v. Muni-swamy Gramany**, 31 M. 329.

MILLER, J.

(17-a) S. 27—See No. 17, *supra*.

(17-b) S. 30—See No. 15, *supra*.

(18) S. 31—Portion of Mortgaged property acquired for public purposes—Mortgagee's right to compensation awarded.

A mortgagee is entitled to take as much security as he can get for his money, and when part of the land mortgaged is taken from him, his security is diminished *pro tanto*. Where, therefore, a portion of the mortgaged property is acquired under the Act for public purpose and the compensation awarded is less than the mortgage money, the mortgagee is entitled to the whole of the compensation in liquidation of the mortgage debt, the indivisibility of the mortgage attaching itself to the proceeds of sale of the portion mortgaged, and the whole and each part of the land mortgaged being security for the whole amount advanced. **Topan Das v. Jeso Ram**, 17 P. R. 1907 = 67 P. W. R. 1907 = 2 P. L. R. 1908.

REID, J.

Reference.—20 C. 241, 16 A. 78, 13 M. 321, R. (18-a) S. 32—See No. 16, *supra*.

1.—Imperial Acts—(Continued).

Act I of 1894 (Land Acquisition)—(Continued).

(19) Ss. 32 and 54—Compensation money paid to Hindu widow—Tiersoner's application for reference—Order by Judge on reference directing refund—Appeal—Revision—Civ. Pro. Code (Act XIV of 1882), S. 622.

Where a Land Acquisition Collector, having awarded a certain sum as compensation for land acquired, paid it to, amongst others, a Hindu widow, and almost six months after the award, her daughter asked for a reference to the Civil Court, and a reference having been made, the Judge ordered the lady to repay the amount withdrawn by her and the same to be dealt with according to the provisions of S. 32 of the Land Acquisition Act;

Held that, until money was deposited in Court by the Collector, the Court could not proceed to deal with it under S. 32,

that the Judge has no power to direct a refund of money already paid by the Collector;

that the order was not one under S. 32, Land Acquisition Act, as the Judge was not in a position to make such an order and so no appeal lay from it and the High Court could properly interfere, under S. 622, Civ. Pro. Code. **Gobindo Rani Dassi v. Brinda Rani Dassi**, 12 C. W. N. 1039.

COLE and BELLI, JJ.

(20) S. 49—"House, manufactory or building"—Acquisition of part only required—Whether whole must be purchased.

Land which is not a house, manufactory or building in the literal sense and which is not reasonably required for the full and unimpaired use of a house, manufactory or building cannot be considered as part of the "house, manufactory or building" within the meaning of Section 49 of Act No. I of 1894. Whether or not the land is so reasonably required is a question of fact depending upon the particular circumstances of each case (a) **Nita Ram v. The Secretary of State for India in Council**, A. W. N. 1908, 63—5 A. L. J. 166—30 A. 176.

BANERJI and RICHARDS, JJ.

Reference—(a) 11 A. 378, D.

(20-a) S. 50—See No. 12, *supra*.

(21) S. 54—Award—Final award—Appeal—High Court.

An appeal lies to the High Court, under S. 54 of the Land Acquisition Act 1894, only, from the final award of the Court.

I.—Imperial Acts—(Continued).**Act I of 1894 (Land Acquisition)—(Concluded).**

Accordingly no appeal lies from an award which merely determines the amount of the gross sum payable as compensation, as preliminary to the further question, to whom the amount so determined should be paid. **Ardeshir Mancherji Kharadi v. Assistant Collector, Poona**, 10 Bom. L. R. 517.

CYANDAVARKAR and HEATON, JJ.

(21-a) S. 54—See Nos. 17 and 19, *supra*

(22) Land Acquisition proceedings—Apportionment of compensation between land-lord and tenant—Presumption of permanency of holding from uniform payment of rent. See ACT VIII of 1885 (TENANCY, BENGAL), No. 9, 12 C. W. N. 432.

(23) Principle of apportionment of compensation between land-lord and tenant. See COMPENSATION, No. 1, 7 C. L. J. 284.

Act IX of 1897 (Provident Funds).

(1) *Provident Fund, attachment of—The Calcutta Municipal Act (III, B. C. of 1899) S. 73—Trustees of the Fund, claim of—Suit—Application.*

The Provident Fund established by the Corporation of Calcutta to which the provisions of the Provident Funds Act IX of 1897 (and consequently the amending Act IV of 1903) were made applicable by the Local Government Notification, dated 8th July 1902, is not liable to attachment. **Sett Munna Lal Parruck v. Frederic Gainsford**, 12 C. W. N. 633=35 C. 641.

HARRINGTON, J.

Act X of 1897 (General Clauses)

(1) S. 3, cl. 25 & S. 4. Standing timber in immovable property under—S. 3, Indian Registration Act—See ACT VIII of 1885 (BENGAL), No. 24, 7 C. L. J. 152.

(2) S. 4—See No. 1, *supra*.

Act Y of 1898.

See CRIMINAL PROCEDURE CODE.

Act II of 1899.

See STAMP ACT.

Act IV of 1899 (Merchandise Marks)

(1) Ss. 2, 4 and 6—Combination of letters, designs and numerals as forming a "trade description"—Defendant alleged to have infringed it—Exclusive right of plaintiffs by user and reputation—Imitation, whether likely to mislead ordinary purchasers.

I—Imperial Acts—(Continued).**Act IV of 1899 Merchandise Marks—(Contd.).**

The plaintiffs, who were importers and shippers of "Grey shirtings" from Manchester, had stamped on these goods a "facing," which consisted of letters, designs and numerals in a particular order, and claimed the whole of this combination as their "trade mark" and charged the defendant, another importer of similar goods, with the infringement of it by stamping his merchandise with a facing so closely resembling theirs in the character and order of his marks as to mislead the public into believing that in purchasing his shirtings they were purchasing the plaintiffs'.

Held (Benson and Moore, JJ., *concurring*) that the defendant had made and used a facing, which was, in many respects, a colourable imitation of the facing of the plaintiffs, to which they had, by user and reputation, an exclusive right, and that the imitation was likely to mislead ignorant and unwary purchasers into believing that the defendant's goods were those of the plaintiffs.

Per Moore, J.—The principle is that no man may canvass for custom by falsely holding out his goods or business, whether by misleading description or by colourable imitation of known marks, packages, and so forth, as being the goods or business of another. Its application is not excluded by showing that the style or words appropriated by the defendant are in themselves not false as he uses them, or that the plaintiff, if he succeeds, will have a virtual monopoly in an exclusive designation which is not capable of registration as a trade mark. The question is, whether the defendant's action naturally tends to cause an ordinary dealer or purchaser (not necessarily the first purchaser, for the effect on the public at large is to be considered) to think he is dealing with the plaintiff or buying the plaintiff's goods.

Held per Davies, J., (*dissentiente*) that the plaintiffs were entitled to an injunction if they established (1) their exclusive user of the above mentioned marking and (2) that the defendant has imitated it, so that the imitation is, in the words of S. 4 of the Merchandise Marks Act, "reasonably calculated to lead persons to believe" that his goods are their goods, that, on the first point, the plaintiffs' right of exclusive user was limited to the first four items of their marking, that is to say, to the name of their firm, their coat of arms, the fac simile initials and the scimitars; and that,

1.—*Imperial Acts*—(Continued).

Act IV of 1899 *Merchandise Marks*—(Concl'd).

on the second point, the defendant had not imitated any of those marks, and further that what he had copied he was at liberty to copy and no one was likely to be deceived thereby. **T. Noorodeen Sahib v. Charles Sowden**, 4 M. L. T. 366 (F. B.)

DAVIES, BENSON, and MOORE, JJ.

References—L. R. 12 A. C. 453. *Leather Cloth Co. v. American Leather Cloth Co.*, 11; *Johnston v. Orr Ewing* and 6 W. 108, R.

(2) S. 4—See No. 1, *supra*.

(3) S. 6—See No. 1, *supra*.

Act IX of 1899 (*Arbitration*).

(1) Oral submission to arbitration—Necessity for submission in writing—Award on oral submission—Validity—Applicability of the Act—See *ARBITRATION*, No. 2, 10 *Bom. L. R.* 366.

(1-a). *Ss. 2 and 19—Order under S. 19 not a decree under S. 2, C. P. C., 1882—Revision—Powers of Chief Court under S. 70 (1) (b) Punjab Courts Act, 1884—“Could be instituted in a Presidency Town,” in S. 2, Arbitration Act, construction of.*

An order passed on an application, under S. 19, Act IX of 1899, for stay of proceedings or for refusing to stay proceedings, is not a decree within the terms of S. 2, C. P. C., 1882. So the Chief Court has no power to have the order revised, under S. 70 (1) (b), Punjab Courts Act, 1884. (a).

The words “could be brought” in S. 2, Act IX of 1899 show that the Act is not limited to suits which cannot be instituted elsewhere than in a Presidency town, but applies to suits, which can be instituted at the plaintiff's option, in a Presidency town or elsewhere. **Clements & Co. v. Rattan Singh**, 144 P. R. 1908.

REID J.

References—(a) 76 P. R. 1908. 70 P. R. 1904, R.; 18 C. 500, not F.

(2) *Ss. 5 and 10—Leave to revoke submission to arbitration—Motion to be in Court—Practice—Staying a case by arbitrators to Court for opinion—Questions as to admissibility of evidence should be decided in their very inception.*

The proper procedure to be followed in moving for leave to revoke a submission to arbitration under S. 5 of the Indian Arbitration Act, 1899, should be by motion in Court.

Where there are more agreements than one between the parties to refer their differences to

1.—*Imperial Acts*—(Continued).

Act IX of 1899 *Arbitration*—(Continued).

arbitration, and the evidence recorded by the arbitrators in one of them is by consent to be treated as evidence in all the submissions, but there is no order consolidating the reference, and there is no consent anywhere, that the different references should be treated as one, it is not competent to any party to seek to revoke the submission to arbitration in all the different cases, by one application alone.

In England, the Court can compel an arbitrator to state a case. The Courts in India have no such power. The Indian Arbitration Act (S. 10) leaves it to the discretion of the arbitrators to state a special case or not as they choose; and the Court has no power to enforce its rulings or directions upon the arbitrators if they do not choose to follow the rulings or obey the directions.

When a party to a submission to arbitration feels aggrieved by the arbitrators deciding improperly or erroneously to admit evidence which they should have rejected, his proper course is to apply to the Court for leave to revoke the submission. On such application the Court will accord or refuse such leave according to the circumstances of each particular case that comes before it. The power of the Court is discretionary and ought to be cautiously and sparingly exercised, but such power should be exercised by the Court in favour of the applicant, if it appears to the Court that the main object of all submissions to arbitration which is to obtain “speedy end of the strife” is not likely to be attained and the applicant is likely to be subjected to “multiplied expenses” and “interminable delays” by the conduct of the arbitrators. Leave to revoke should be accorded to the applicant in all cases where he can establish that there will be failure of justice if the reference is allowed to proceed” (a).

The arbitrators ought to form a clear and definite opinion as to what questions are referred to their arbitration, and decide what is within the scope of the reference and what is outside it. If this is once definitely settled there would be no difficulty in their deciding the question of admissibility of any evidence that may be tendered by one or other of the parties. *In re, Indian Arbitration Act. Re Atlas Insurance Co.*, 10 *Bom. L. R.* 351.

DAVAR, J.

References—(a) 2 Q. B. 915, 23 Q. B. D. 12 and 1 Q. B. 102, referred to with approval.

1.—*Imperial Acts*—(Continued).**Act IX of 1899 (Arbitration)**—(Continued).(2-a) S. 10—See No. 2, *supra*.(3) *Ss. 11 (2) & 14 Lower Burma Courts Act, S. 14—Civ. Pro. Code, S. 2—Award—Whether an order of Court necessary for filing it—Order dismissing application to set aside award—Whether decree.*

Under the Arbitration Act no order of the Court is necessary for the filing of an award, and an order dismissing an application to set aside the award is neither a suit nor an appeal, and there is nothing in the Arbitration Act to show that it is to be treated as a suit.

The order, therefore, is not a decree within the meaning of the Civ. Pro. Code, and appealable as such.

The provisions of the Arbitration Act clearly indicate that an award, upon a submission, which contain no provision to the contrary, is final, unless the Court in which it has been filed remits it or sets it aside. **Khatoun Bee v. Abdool Rahman**, 14 Bur. L. R. 129—4 L. B. R. 249.

IRWIN & ORMOND, JJ

Reference —33 C, 757, D

(4) S. 14—Whether parties can, by consent, oust jurisdiction of Court to set aside award in cases of misconduct of arbitrators and of improper procurement of award See ARBITRATION, No. 4, 13 C. W. N. 63.

(4-a) S. 14—See No. 3, *supra*.(5) S. 19—*Applicability of the section.*

S. 19 of the Arbitration Act applies only to cases where there has been a submission to arbitration *before* the commencement of the legal proceedings; the section has no application where the parties agreed to the arbitration *after* the institution of the suit. **Ram Jidas Poddar v. Howse**, 35 C. 199.

MACLEAN, C. J., STEPHEN and WOODROFFE, JJ.

(6) S. 19—*Reference to arbitration—Right to have recourse to ordinary tribunals—Proceeding with the reference after suit filed—Award before disposal of suit—Effect.*

To proceed with a reference, when notice had been received that a suit has been filed, is improper. The right of reference to arbitration does not exclude the right of recourse to the ordinary tribunals, and is, indeed, subject to

1.—*Imperial Acts*—(Concluded).**Act IX of 1899 (Arbitration)**—(Concluded).

it. Where one party has referred any matters in dispute to the decision of a law Court by filing a suit, the other party may apply for a stay of proceedings under S. 19 of the Act, but, failing such application or in the event of such application being made and refused, there is no alternative but to submit to the jurisdiction of the Court.

An award obtained by one of the parties during the pendency of a suit can have no operation inconsistent with the decree which would follow the judgment. **Messrs. Louis Dreyfus and Co. v. Seth Shivakram Harkarandas**, 1 S.L. R. 255.

CROUCH, A.J.C.

(7) S. 19—See No. 1-a, *supra*.**Act V of 1902 (Administrator General and Official Trustees).**

(1) Official trustee whether prohibited from being appointed as executor—See ACT V OF 1881 (PROBATE AND ADMINISTRATION), No. 3, 35 C 156.

Act 55 and 56 Yic. ch. 14 (India Council's Act).

S. 5—Power of local Legislature to amend an Act passed by the Supreme Legislative Council. See ACT XIV OF 1869, AMENDED BY ACT I OF 1900 (CIVIL COURTS), No. 1, 10 Bom L. R. 924.

2.—*Bengal Acts.***Act X of 1859 (Bengal Rent Recovery).**

(1) *Rent Recovery Act (X of 1859), appeals under—Procedure—Civ. Pro. Code, Ss. 560 and 588—Applicability of Civ. Pro. Code—Act X of 1859, S. 161—Complete Code—Transfer of brief—Pleader not named in Vakalatnama—Adjournment—Hearing ex parte—Proper discretion.*

S. 560 of the Code of Civil Procedure, and by necessary implication, S. 588 also, are applicable to appeals under Act X of 1859 by the operation of S. 161 of the Act (a).

Quere.—Whether the proposition that "Act X of 1859 is a complete Code in itself" requires modification in view of the decision in L. R. 9 I. A. 174.

In an appeal before a District Judge, a respondent engaged two pleaders. On the day of hearing, the pleader being ill had transferred

2—Bengal Acts—(Continued).

Act X of 1859 (Bengal Rent Recovery)— (Concluded).

his brief to another pleader whom the Judge declined to hear as his name did not appear in the vakalatnama. The junior not being instructed to argue, applied for a day's adjournment to get himself ready. This was refused and the appeal was decreed *ex parte*.

Held, the Judge had erroneously exercised his discretion. He ought either to have allowed the pleader, who appeared, to argue the case or allowed an adjournment, making if necessary an order for costs in favour of the appellant **Hare Krishna Mahanti v. Bishun Chandra Mahanti**, 7 C. L. J. 426=12 C. W. N. 888=35 C. 799.

STEPHEN and MOORJEE, JJ.

References — (a) Marshall, 148, 18 C. 368, 21 C. 428 & 21 C. 514, *R*; 28 C. 532, S. D. A Decisions (1861) 144 & 7 C. 295, *relied on*

(2) if well contained. See Civ. Pro. Code No. 293, 12 C. W. N. 893.

(3) S. 153—*Final order of Collector*:—*Appellate order*:—*High Court's power to interfere in revision*.

S. 153 of the Act does not preclude revision by the High Court of an order of a Collector, which is final within the meaning of that section. **Mohant Gobind Ramanuja Das v. Lakshum Pardia**, 11 C. W. N. 112=8 C. L. J. 43.

BRETT and GUPTA, JJ.

See, also 1 Act VIII of 1855 (Bengal), No. 4
" " " *Res judicata*, No 19

Act XI of 1859 (Revenue Sale law).

(1) *Sale under—Setting aside sale—Appropriation of payments by Collector—Contract Act (IX of 1872), Ss. 59 and 60.*

A revenue sale was set aside on the ground that there was no arrear inasmuch as the Collector ought to have appropriated the amount sent by the owner to the payment of the January list for which the sale was held and not to the following March list.

Whether Ss. 59 and 60 of the Contract Act apply to the appropriation of land revenue sent to the Collector discussed (a). **Jogendra Mohan Sen v. Uma Nath Guha**, 12 C. W. N. 646=8 C. L. J. 41=35 C. 636

MACLEAN, C. J., and DOS, J.

References :—(a) 10 C. W. N. 948 and 33 C. 1193, *Diss.*

2—Bengal Acts—(Continued).

Act XI of 1859 (Revenue Sale law).—(Contd.).

(2) *Sale under—Suit by purchaser for recovery of possession or for assessment of rent and mesne profits—S. 37* See GRANT, No 1, 45 C. 931.

(3) Ss. 13, 14, 53 and 54—*Sale of a share of an estate, effect of—Incumbrance—Mortgage, previous—Purchaser at the revenue sale, right of—Difference between language and scope of Ss. 53 and 54 of the sale law—Title of auction-purchaser when accrues.*

A purchaser under S. 13 of the Revenue Sale Law (Act XI of 1859) does not acquire merely the right, title and interest of the defaulting proprietor, but he takes the share itself which is exposed for sale, subject to the limitations prescribed in the section.

The words "shall not acquire any rights" in S. 54 of the Act refer to the acquisition of rights in respect of interest, such as encumbrances, or the like, which are referred to in the previous phrase of that section (a).

If a person acquires the interest of the original owner of the estate before the default is made, his interest cannot be said to be an encumbrance, and passes by the sale to the purchaser, because what is sold is in essence his share in the estate.

The words, "purchaser shall not acquire any rights which were not possessed by the previous owner or owners" in S. 54 of the Act, do not mean that the purchaser at the revenue sale shall only acquire the rights possessed by the previous owner or owners at the date of the sale, but that the purchaser shall not acquire any rights not possessed by the previous owner or owners at sometime or another, and shall acquire no more than what was the property of the previous owner or owners.

The purchaser at a sale for arrears of revenue of a share of an estate under S. 13 does not take the property subject to encumbrances created after the date of the default and before the date of the revenue sale (b).

A purchaser of the interest of the proprietor, after default and before revenue sale, is quite as much bound by the revenue sale as the proprietor himself, because, in substance, he occupies the position of the proprietor.

Although the purchaser does not take subject to any encumbrances created after the default, he takes subject to such encumbrances only as

2—Bengal Acts—(Continued)

Act XI of 1859 (Revenue Sale Law)— (Continued)

have been created before default and are in actual existence because undischarged, or though discharged on the date of the revenue sale, may, upon equitable principles, be allowed to be set up (c).

The language and scope of S. 53 are materially different from those of S. 54 of the Act, under the one section, the purchaser takes subject to all encumbrances existing at the time of the sale, while under the other, no encumbrance created after default is binding on the purchaser.

Although an auction purchaser does not acquire a full title till the confirmation of the sale, yet upon general principles, he may have equitable rights, arising out of his purchase before the date of confirmation of the sale (d).

Bhowani Koer v. Mathura Prasad, 7 C.L.J. 1.

BRETT and MOOKERJEE, JJ.

References :— (a) 22 C. 641, 29 C. 223, 14 B. L. R. 170—22 W. R. 449, *It*, (b) 17 C. 148, 3 C. L. J. 52, *It*, (c) 31 I. A. 176—32 C. 27, *D. Expl.*, (d) 17 B. 375, 19 A. 188, 14 A. W. N. 54, 10 B. 453, 2 C. W. N. 589, 11 C. W. N. 158, 15 L. R. A. 68, 24 L. R. A. 449, 12 L. R. A. 62, *It*.

(3-a) S. 14—See No. 3, *supra*.

(4) Ss. 27 and 54—*Title of purchaser, when vests—Title, when complete—Sale certificate evidence of title—Purchaser takes subject to encumbrance—Power of proprietor to deal after default—Mortgage of non-existent property.*

Under S. 27 of the Revenue Sale Law the title automatically vests in the purchaser at the revenue sale by reason of the sale and payment of the purchase-money. It becomes complete as soon as the sale becomes final and conclusive, even though possession is not obtained. The certificate of sale does not create title, it is merely evidence of title (a).

The purchaser of a share of an estate, under S. 54 of the Revenue Sale Law, takes the share subject to encumbrances, which were in existence on the date to which the title relates back, (that is, the day after that fixed for the last day of payment), and were in force on the date of sale.

The power of the proprietor to deal with his property is not lost by reason of the default in payment of revenue, if no sale was held by the Collector on the basis of such default, a mortgage created by the owner after default is not inoperative (b).

2—Bengal Acts—(Continued).

Act XI of 1859 (Revenue Sale Law)— (Continued).

A mortgage of non-existent property, though inoperative as a conveyance, is operative as an executory agreement, which attaches to the property the moment it is acquired, and, in equity, transfers the beneficial interests to the mortgagee without any new act done by the mortgagor to confirm the mortgage. **Khobhari Singh v. Ram Prasad Roy**, 7 C. L. J. 387.

MOOKERJEE and CASPERSZ, JJ.

References :—(a) 7 C. L. J. 384, *applied*, (b) 32 C. 27 (38) *referred to*.

(5) S. 37, *exc. 4*—*Houses and tank built by encumbrancer—Suit to avoid encumbrance—Assignee from purchaser—Right of suit—Limitation Act (XV of 1877), Sch. II, Art. 121*

Where a person claims exemption from the provisions of the Revenue Sale Law, which entitle a purchaser to annul encumbrances in respect of land in his possession, the benefit of the 4th exception to S. 37 of the Act must be limited only to such portions of land as are covered by buildings, tanks, etc., and cannot be extended to cover those lands included in the lease on which buildings and tanks, etc., have not been constructed.

An assignee of a purchaser of an estate sold under the Revenue Sale Law is entitled to bring a suit to avoid encumbrances, Art. 121 of Sch. II of the Limitation Act applying to such a suit. **Wahid Ali, v. Rahat Ali** 12 C. W. N. 1029.

BRETT and COYE, JJ.

(5 a) S. 53—See No. 3, *supra*.

(6) S. 51—*Purchaser of share—Right to recover from person who has acquired title by adverse possession previous to default*

Whether adverse possession is completed before or after the date of default, a purchaser at a revenue sale of a share of an estate in respect of which a separate account has been opened in the Collectorate becomes entitled to possession of the share.

If the adverse possession was completed before default, the default must be treated as the default of the person who has acquired title by adverse possession and the sale must be held to pass his interest. **Kumar Kalanand Singh v. Syed Sarafat Hossein**, 12 C. W. N. 528.

STEPHEN and DOSA, JJ.

2.—Bengal Acts.—(Continued).**Act XI of 1869 (Revenue Sale Law)—(Concluded).**(7) S. 54—See Nos. 3 and 4, *supra*.**Act VIII of 1865 (Rent Recovery).**(1) S. 16—Sale—Purchase—Encumbrances, avoidance of—*Estoppel*—*Plaint*—*New case*—*Notice to quit*—*Maintainability of suit*.

Where a purchaser of a tenure in a sale held under the provisions of Act VIII of 1865 (B. C.) sued the person in possession for rent, and obtained an *ex-parte* decree, and then brought a suit, for enhancement of rent, to which the defendant pleaded that he was entitled to hold the land under a *mokarari potta* upon which the plaintiff withdrew his suit and brought the present suit for ejectment.

Held the plaintiff was not estopped from bringing the suit by reason of his having brought a rent suit against the defendant. Under S. 16 of the Act, he is allowed to avoid encumbrances, and if the defendant would not accept the position of tenant offered him and pay a reasonable rent, the plaintiff is entitled to eject him.

No previous notice to quit need be given for the maintainability of a suit of this nature (a).
Arsali Sadagar v. Ram Satya Bhakat, 7 C. L. J. 191.

MACILAN, C. J., and HOLMWOOD, J.

References.—(a) 11 W. R. 160 explained, 9 C. 683, F.

Act VIII of 1869 (Landlord and Tenant).(1) S. 6—*Bengal Tenancy Act (VIII of 1865)*, S. 116—*Kamat land*—*Right of occupancy*—*Tenant, holding over*.

Where the rights of the parties were governed by Bengal Act VIII of 1869, lands which were *kamat* did not cease to be so by virtue of a *mokarari* settlement of the same.

A tenant of *kamat* land does not acquire a right of occupancy by holding it over after the expiry of the lease. **Syed Khalilur Rahman v. Rupan Mahton**, 12 C. W. N. 136.

STEPHEN and DOSE, JJ.

Act VI of 1870 (Chowkidari).(1) S. 51—*Resumption of chakran land*—*Lessee from chowkidar, rights of*.

When chowkidari land is resumed and transferred by the Collector to the zemindar, the interest of the chowkidar in the land and, along with it, all rights created by him in favour of others cease.

2.—Bengal Acts.—(Continued).**Act VI of 1870 (Chowkidari)—(Concluded).**

S. 51 of the Chowkidari Act does not save rights created by the chowkidar, but refers to contracts made by the zemindar in respect of the village in which the chowkidari land or any portion of it is situate. **Krishna Kinkar Dutta v. Mahanto Bahagaban Das**, 12 C. W. N. 161—7 C. L. J. 85—35 C. 185.

MITRA and CASPERSZ, JJ.

Act V of 1876 (Chota Nagpore Encumbered Estates).(1) S. 3 (3) (c)—*Contract by person subsequently declared to be owner of Encumbered Estate*—*Subsequent withdrawal of encumbrance*—*Revival of validity*—*Bar-ring of pending suits*—*'Debts and liabilities,' meaning of*.

A contract, entered into by a person who is subsequently declared to be the heir of a deceased person, whose estate had been, at the time of the contract, taken charge of under the Encumbered Estates Act, is void, as such person had no competency to contract.

Even though at the time of the execution of the contract he had not been declared to be the heir, yet, as soon as he was found to be the heir, he became heir from the time of the devolution of the estate, which was admittedly prior to the execution of the contract, and such contract became void for want of capacity to contract.

On the release of the estate from the operation of the Acts, the validity of the contract could not be revived as it was absolutely void.

While the suit was pending, the estate was taken charge of for the second time, and the suit, therefore, became barred.

It does not matter, if the particular liability has not been mentioned in the application under the Act, as 'debts and liabilities,' in S. 3, mean 'all debts and liabilities of the holder of the estate taken charge of, other than debts or liabilities incurred to Government' (a) **Raja Satrugnan Deo Dhabal v. Raja Jagadish Chandra Deo Dhabal**, 7 C. L. J. 578.

RAMPINI and SHARFUDDIN, JJ.

References.—(a) 20 C. 609 and 33 C. 1065, F.

Act VII of 1876 (Land Registration).(1) *Co-trustee, application by, for Registration*—*Refusal by the Revenue authorities*—*Circuit Court's authority to direct registration*—

2—Bengal Acts—(Continued).

Act VII of 1876 (Land Registration)—(Contd.).

Suit, maintainability of—Declaration of right to possession.

Where plaintiff's application for the registration of his name as a co-trustee, under the Land Registration Act, was refused by the Revenue authorities.

Held—That a Civil Court is not competent to direct the action of the Revenue authorities under the Land Registration Act, and a suit brought by the plaintiff with the object of obtaining an order from the Court which would bring about a re-consideration of the order passed by the Revenue authorities so as to obtain the registration of the plaintiff's name as a co-trustee is not maintainable.

Held, further, on the construction of a compromise decree on the basis of which the suit was brought, that the plaintiff was not entitled to a declaration of his right to the possession of the trust property jointly with the defendant—this order, however, not affecting the right of the plaintiff or any one else to take action in the case of any malversation by the defendant. **Chhattarpat Singh Dugar v Maharaj Bahadur Singh**, 12 C. W. N. 441, (P. C.)—10 Bom. L. R. 262=7 C. L. J. 395=18 M. L. J. 125=3 M. L. T. 344.

LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOTLAND, SIR ARTHUR WILSON

(2) Ss. 3 (10), 78—*Revenue-free property—Resumption under Reg XXXVII of 1793*

The mere fact that the area of the land is over 100 bighas and that it was capable of being resumed by Government under Reg XXXVII of 1793 is not sufficient to make it revenue-free property within the meaning of S. 78 of the Land Registration Act. **Ratanmani Debji v. Dina Nath Chatterjee**, 8 C. L. J. 523.

MITRA and GEIDT, JJ.

(3) S. 55—*Land Registration dispute—Reference to Civil Court—Conditions to be satisfied before making reference—"Possession" meaning of—Mahomedan Law—Dower—Widow's right to hold property till dower paid—High Court—Revision.*

Before the Collector can order the name of an applicant to be registered as Proprietor of an estate or any interest therein under the provisions of the Land Registration Act, he must satisfy himself, that the possession of the estate exists in the applicant as alleged, or that

2—Bengal Acts—(Continued).

Act VII of 1876 (Land Registration)—(Contd.).

a succession or transfer has taken place as alleged, and that the applicant has acquired possession in accordance with such succession or transfer, but not otherwise. The determination of the question of possession alone is sufficient when the applicant claims to have assumed charge as joint proprietor on behalf of his co-sharers or as manager. When, however, the applicant claims to be proprietor by succession or transfer, the Collector has to satisfy himself on two points, namely, that the succession or transfer has taken place and that the applicant is in possession accordingly. If the succession or transfer is proved but possession is found against the applicant, his name cannot be registered, or conversely, if possession alone is proved, but the succession or transfer is not established, i. e., if the possession proved is not attributable to the title set up, the application for registration must be refused.

The first duty of a Collector, in a case of dispute, is to determine whether any person is in possession of the disputed interest. If possession is found to be with any person, the Collector has no jurisdiction summarily to oust him. He can determine the question of the right to possession or refer it to the Civil Court, only, when, upon investigation, no one is proved to be in possession.

Possession in S. 55, Land Registration Act, does not mean lawful possession, but actual possession which includes possession by receipt of rent, the possession of the tenant being in a sense the possession of the landlord.

When, a Mahomedan widow has obtained possession of the undistributed property of her deceased husband lawfully, and, without force or fraud, she is *prima facie* entitled, as against the other heirs of her husband, to retain possession until her dower-debt or any portion of it which is due and unpaid is paid.

The jurisdiction which the Civil Court acquires upon a reference to it under S. 55 of the Land Registration Act is that of a Civil and not of a Revenue Court, and its decision is subject to revision by the High Court.

The ordinary rule is that where an aggrieved party has other remedy available, e.g., by regular suit, the High Court is unwilling to interfere in revision, but, even if there be such remedy, the High Court may interfere in exceptional cases. **Musst. Umatul Medhi v. Musst. Kulsoom**, 12 C. W. N. 16=35 C. 120=8 C. L. J. 245.

BRETT and MOOKERJEE, JJ.

2—Bengal Acts—(Continued).**Act VII of 1876 (Land Registration)—(Contd.).**

- (4) *Ss. 59 & 63—Power of High Court to revise order made by a civil Court under S. 59, Land Registration Act—Jurisdiction.*

The High Court has, under S. 622 of the Civ. Pro. Code, jurisdiction to revise the order of a Civil Court under S. 59 of Act VII of 1876. S. 62 of that Act makes an order of the Civil Court final and not subject to appeal or order for review. It does not prevent the High Court from revising the order either under S. 622, C. P. C., or under the Charter Act (a).

The competency of a Court consists in territorial as well as pecuniary jurisdiction. Hence where a Court has only territorial jurisdiction, but no pecuniary jurisdiction, it is not a competent Court within the meaning of S. 59 of the Act.

As soon as the certificate is sent to the Collector and the Collector registers the names of the persons, who are successful in the Civil Court, the function of the Civil Court ceases. The High Court cannot therefore, further interfere in the matter. **Rameshwar Singh v. Raghunath Singh**, 35 C. 571.

MITRA and CASPIRSZ, JJ.

Reference—(a) 35 C. 120, F.

(1-a) S. 63—See No. 4, *supra*

- (5) *S. 78—Milkat property—Such property entered in register of revenue-free estates—Distinction—Registration whether necessary for ordinary milkat property not so entered—Regulation II of 1819*

A *milkat* property which is covered by an entry in the Collectorate in the general register of revenue-free estates, released after proceedings held under Regulation II of 1819, is distinct from an ordinary *milkat* property not so registered. Where the *milkat* property is not already included in the general register of revenue-free estates there need be no registration under Bengal Act VII of 1876, and, if no registration be necessary, S. 78 of the Act does not apply, the disqualification in bringing suits for rent being one, which attaches only, to revenue-free estates, already entered in the general register, if the proprietor, or manager, or mortgagor fails to register his name. **Pitamber Singh v. Sukrim**, 35 C. 747.

MITRA and CASPIRSZ, JJ.

- (6) *S. 78—Registration during pendency of suit.*

2—Bengal Acts—(Continued).**Act VII of 1876 (Land Registration)—(Contd.).**

If the name of a proprietor is registered under the Land Registration Act, during the pendency of a suit for rent by him, and the registration decree is produced on the course of the trial, it must be held that there is sufficient compliance with the requirements of the Act. **Rabia Khatun v. Rani Bilashmani Debi**, 8 C. L. J. 299.

RAMPINI and MOOKERJEE, JJ.

- (7) *S. 78—Malikana, claim for—Malikana, not rent.*

S. 78 of the Land Registration Act is no bar to a claim for *malikana*, which is not a claim for rent (a). **Syed Shah Najamuddin Hyder v. Syed Zahid Hussein**, 8 C. L. J. 300.

MOOKERJEE and CASPIRSZ, JJ.

Reference—4 B. L. R. 29, F.

- (8) S. 78—See No. 2, *supra*

Act I of 1879 (Chotanagpur Landlord and Tenant Procedure).

- (1) *Ss. 27 & 112—Suit by assignee from auction-purchaser of permanent tenure to recover from landlord, if possessory suit—Limitation—Limitation Act (XV of 1877), Sch. II, Arts. 138 and 142, S. 14—Exclusion of time if must be asked in plaint—Civ. Pro. Code (Act XIV of 1882), S. 50*

A suit by a transferee from a purchaser of a permanent tenure at a rent sale to recover possession of the tenure from the landlord who denied the title of the plaintiff on the ground that on the death of the previous tenant, the land reverted to himself, was not a possessory suit to which the provisions of S. 37 of the Chotanagpur Landlord and Tenant Procedure Act could apply.

Art. 138 of Sch. II of the Limitation Act refers more to questions between the auction-purchaser and the judgment debtor, and the present case fell under Art. 142 of Sch. II of the Limitation Act.

The special limitation provided in S. 12 of the Chotanagpur Landlord and Tenant Procedure Act did not apply to this case.

The period during which a suit was prosecuted *bona fide* in a Court without jurisdiction was properly excluded in computing the period of limitation although the plaintiff in this plaint did not expressly ask for an extension of time on that ground (a). **Raghu Nath Bhagat v.**

2.—Bengal Acts—(Continued)

Act I of 1879 (Chotanagpur Landlord and Tenant Procedure)—(Concluded).

Syed Samad Shah, 12 C. W. N. 617, 7 C. I. J. 560.

STEPHEN and DOSS, JJ.

Reference —(a) 8 C. W. N. 168 : 31 C. 195, D. (1-a) S. 42—See No. 1, *supra*.

(2) —as amended by Act V of 1905, B.C., S. 164 —*Record-of-rights—Land recorded as mundari Khuntkati tenancy—Entry, suit to correct, if lies—Bengal Tenancy Act (VIII of 1885), S. 103 B—Presumption if applies in a suit to correct entry.*

Where a purchaser, under the provisions of S. 123 of the Chota Nagpur Tenancy Act of certain tenures of which a record-of-rights had been prepared, sued to have a declaration that certain entries in the record with regard to a *mundari khuntkati* tenancy were incorrect,

held, that the provisions of S. 164 of the Act (I of 1879) as amended by Act V of 1905 applied,

that the object of these provisions was to make the entries irrefutable and the Legislature intended to preclude suits of this nature.

The word "particulars" in Sec. 161 have a very wide application and cover entries declaring that the tenants have to pay certain rents named in the record-of-rights to a person other than the plaintiff.

There is no limitation as to the nature of the suit to which the provisions of S. 103 B, B. T. Act, apply. The presumption as to the correctness of the entries in the record-of-rights will operate even in a suit to declare the entries incorrect. **Tokhi Sahu v. Tosi Munda**, 13 C. W. N. 111.

RAMPINI and SHARFUDDIN, JJ.

Act IX of 1880 (Cess).

(1) *Ss. 4 and 41—Mela, profits of, if assessable, with road-cess—"Annual value"—"Rent"—"Tenure-holder"—"Stall-holders and vendors at mela, if tenants or mere licensees"—"Immovable property" mela if—Levy of cess over and above income-tax, if legal.*

It cannot be affirmed as a general proposition that the liability to pay income-tax carries with it as a necessary consequence exemption from Road and Public Works cesses (a)

A *mela* is annually held for 20 days, from the 5th to the 25th Falgun, on lands which

2.—Bengal Acts—(Continued).

Act IX of 1880 (Cess)—(Continued).

are included in the *jotes* or holdings of agricultural tenants (but on which no crops are standing at the time the fair is held), under an arrangement between the *zemindar* and the holders of the *mela*, to which the tenants are not parties. The Collector assessed Road and Public Works cess, not only on the rents paid to the *zemindar* by the *rayats*, but also on the profits realized by certain *jaradars* under the *mela* holders from the stall-holders and vendors of live-stock, etc., at the *mela*.

Held, that these profits are not rent payable by either cultivating *rayats* or by other persons in the actual use or occupation of land, within the definition of 'annual value' in S. 4 of the Cess Act, and cannot be assessed with road-cess.

Per Rampini, C. J.—The profits of a *mela* may come within the definition of rent paid for the actual use and occupation of land by persons other than cultivators, or of immovable property as defined in S. 4 of the Cess Act. But whether in any particular case they do so or not will depend on the terms of the lease in that case.

Per Brett and Woodroffe, JJ.—A *mela* or fair does not come within the definition of immovable property in S. 4 of the Cess Act.

The holders of the *mela* in this case or the *jaradars* under them are licensees and not tenure-holders within the Act.

Per Rampini, C. J.—The definition of tenure-holder in the Act is very wide and may include persons in the enjoyment of the profits of a *mela*. But whether in any particular case such persons are tenure-holders or not, will depend on the terms of the lease.

Per Brett and Woodroffe, JJ. (Rampini, J. and Mookerjee, J. contra)—The definition of "annual value" contemplates that the rent shall be payable by persons in occupation during the year, not by persons occupying the land for 20 days during each year.

Per Mookerjee, J.—The stall-holders and other persons attending the *mela* for the purpose of selling articles of merchandise are licensees and not tenants.

Per Rampini, C. J.—The sums payable by stall-keepers may come within the definition of rent. **The Secretary of State for India in**

2.—Bengal Acts—(Continued).

Act IX of 1890 (Cess)—(Concluded).

Council v. Karuna Kanta Chowdhury, 11 C.W.N. 1053 (F.B.) = 6 C. L. J. 342 = 35 C. 82.

RAMPINI, C.J., BRETT, MITRA, WOODROFFE and MOOKERJEE, JJ.

Reference:—(a) 28 C. 637, considered and expl.

(2) S. 41—See No. 1, *supra*.

Act III of 1884 (Bengal Municipalities).

(1) *Ss. 85 (a), 87 (d) and 116—Salary earned but not spent within Municipality,—if may be assessed—Civil Court's jurisdiction to review assessment—“Circumstances and property within the Municipality.”*

The defendant was assessed by the plaintiff Municipality with taxes under S. 85 (a) of the Bengal Municipal Act on the basis of the salary earned by him within the Municipality, but he objected that he spent a portion of it outside the jurisdiction of the Municipality and therefore no assessment could be made on that portion.

The Plaintiff Municipality having sued the Defendant for the tax as assessed,

held, that the Defendant was not precluded from raising his objection to the assessment in the Civil Court.

That the defendant had been correctly assessed “according to his circumstances and property within the Municipality,” within S. 85 (a) of the Bengal Municipal Act.

Jurisdiction of Civil Courts to review the decisions of quasi judicial bodies like a Municipality in regard to assessment of taxes discussed with reference to authorities. **Chairman of Giridih Municipality v. Suresh Chandra Mozumdar**, 12 C. W. N. 709 = 7 C. L. J. 631 = 35 C. 859.

STEPHEN and MOOKERJEE, JJ.

(2) S. 87 (d)—See No. 1, *supra*.

(3) S. 116—See No. 1, *supra*.

Act VIII of 1885 (Bengal Tenancy).

(1) Assignee of rent and of arrears of rent of land is a landlord within meaning of—See LAND-LORD AND TENANT, No. 13, 7 C. L. J. 425.

(1-a) *Ss. 5 (5) and 120—Ejectment, suit for—Tenant, holding over after expiration of lease—Indigo facto:y—Cultivating raiyat*

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.)

—Notice to quit, if necessary—Factory Zest—Malik's khud khas—Proprietor's private land—Presumption.

Indigo zerait lands, in the absence of evidence to shew that the lands were ever in the khas possession of the land-lord, or their ancestors, do not come within the definition of proprietor's private lands contained in S. 120 of the Act.

The presumption arising under S. 5 (5) of the Act is a rebuttable one.

A raiyat of at least 10 years' standing and now holding over is not a trespasser and cannot be ejected until his tenancy has been determined by a notice to quit or in some other legal manner. **H. B. Dalglish v. Damodar Narain Chowdhury**, 8 C. L. J. 533.

RAMPINI and CASPERSZ, JJ.

References.—24 C. 272 & 10 C. 45, R.

(2) S. 11, whether imports that non-permanent tenures are not to be regarded as transferable—See EJECTMENT, No. 2, 7 C. L. J. 553.

(3) *Ss. 11 and 12—Release by co-sharer, if transfer—Stamp—Registration—Non-payment of land-lord's fee, if invalidates transfer—Bengal Tenancy (Validation) Act (I of 1903), S. 1—Breach of covenant—Cessor of liability.*

Certain co-sharers in a permanent tenure by a deed, dated 2nd December, 1893, which was registered in Book I, under S. 51 of the Registration Act, relinquished all their right, title and interest and claim in the tenure in favour of the remaining co-sharer who, it was stipulated, was to remain in possession and was to be entitled to sell the tenure. He was also to pay certain debts mentioned in the deed for which the other co-sharers were to be under no liability. The deed was stamped with a five rupee stamp as a release. No landlord's fee was paid as required by S. 12 of the Bengal Tenancy Act,

Held—That the deed was a transfer within the meaning of S. 12 of the Bengal Tenancy Act and the transfer was complete as soon as the document was registered. The non-payment of landlord's fee did not render the transfer invalid owing to the operation of S. 1 of Act I of 1903, B. C.

2.—Bengal Acts—(Continued).**Act VIII of 1885 (Bengal Tenancy)—(Contd.).**

Held, further, that the liability of the co-sharers under the lease ceased with the transfer (a). **Hemendra Nath Mukerji v. Kumar Nath Roy**, 12 C. W. N. 478

MACLEAN, C. J., and COXE, J.

References.—(a) 16 C. 642, 19 C. 17, F.

- (4) Ss. 11, 18, 74 and 179—*Mokurari*, meaning of—*Abwab*—*Rent*.

The word “*mokurari*” means “with fixed rent,” that is to say, when applied to a tenure, it means a tenure held at a fixed and permanent rate of rent.

Held, upon a construction of the lease in this case, that it was not a *mokurari* lease, and that the stipulation in the lease for payment of Rs. 3, instead of delivery of 2 goats, was an *abwab*, and that the case did not fall within the protection of S. 179 of the Bengal Tenancy Act. **Gayratulla Sardar v. Girish Chandrá Bhaumik**, 12 C. W. N. 175.

MACLEAN, C. J., and HEIDT, J.

- (4-a) S. 12—Sec No. 3, *supra*.

- (4-b) S. 18—Sec No. 4, *supra*.

(5) S. 21—Suit for ejectment—Cultivating raiyat—Occupancy right, in what land accrues—Sec LANDLORD AND TENANT, No. 9, 7 C. L. J. 475.

- (6) S. 22—‘Or otherwise’—*Ejusdem generis*—*Mortgage lien*, if subsists.

The words ‘or otherwise’ in S. 22 of the Bengal Tenancy Act, must be construed, ‘*Ejusdem generis*’ and do not include the case of a holding reversioning to the land-lord on the failure of the tenant’s heirs (a).

In such a case the lien of a mortgagee to whom the tenant had mortgaged the holding, does not subsist. **Muktakeshi Das v. Pullin Behary Singh**, 8 C. L. J. 324=13 C. W. N. 12

HOLMWOOD and SHARFUDDIN, JJ

Reference.—(a) 2 C. L. J. 570, F.

- (7) Ss. 30, 37, 50, 52 and 115—*Res judicata*—*Presumption as to status from uniform payment of rent, after record of rights published*—*Suit for increase of rent for increased area*—*Civil Procedure Code (Act XIV of 1882), S. 13*—*Res judicata*.

Where, after an entry in the record-of-rights that the tenant is an occupancy raiyat, the landlord brought a suit for enhancement of rent,

2.—Bengal Acts—(Continued).**Act VIII of 1885 (Bengal Tenancy)—(Contd.)**

Held, that, notwithstanding the provisions of S. 115 of the Bengal Tenancy Act, the tenant was entitled, upon proof of uniform payment of rent for 20 years, before the record-of-rights was framed, to the benefit of the presumption under Sub-sec. (2) of S. 50.

That the word “thereafter” in S. 115 refers to a period subsequent to publication of the record-of rights.

A suit for assessment of additional rent on the same additional area which formed the subject matter of a previous suit, is barred as the decision in the previous suit operates as *res-judicata*. **Maharaja Radha Kishore Manickya Bahadur v. Umed Ali**, 12 C. W. N. 901.

DOSS, J.

- (7-a) S. 37—See No. 7, *supra*.

(8) Ss. 38 and 52—Abatement of rent of portion of which tenant did not obtain possession. See LANDLORD AND TENANT, No. 16, 12 C. W. N. 767.

- (9) S. 50—*Land Acquisition proceeding*—*Apportionment of compensation between landlord and tenant*—*Presumption of permanency of holding*.

Although S. 50 of the Act does not apply when the question of the permanency or otherwise of tenure arises in a proceeding for the apportionment between landlord and tenant of money awarded for compulsory purchase of land the principle involved in the section is a useful guide to the Courts in deciding it. **Nunda Lal Gossami v. Atarmani Das**, 12 C. W. N. 432=35C. 763.

MACLEAN, C. J., and COXE, J.

- (9-a) S. 50—See No. 7, *supra*.

- (9-b) S. 52—See Nos. 7 and 8, *supra*.

- (10) Ss. 54, 61 and 67—*Tender of rent—Refusal—Deposit in Court if essential to stop interest—Tender how kept good*.

Held, by a majority of the Full Bench (Rampini, C. J., and Mitra, J., *dissenting*) to stop interest on rent running in a case governed by the Bengal Tenancy Act, a tender of rent, which is improperly refused, need not be followed up by a deposit of rent in Court under S. 61, and such a tender, if kept good, is sufficient to stop interest running from the date of tender.

2.—Bengal Acts—(Continued).**Act VIII of 1885 (Bengal Tenancy)—(Contd.).**

A tender, which has been validly made and improperly refused, is kept good, if the person, who has made the tender, has from that time always kept the money ready to be paid on demand (a). **Kripa Sindhu Mukerjee v. Annanda Sundari Debi**, 11 C. W. N. 983 (F. B.) = 6 C. L. J. 273 = 35 C. 34.

RAMPINI, C. J., and BRETT, MITRA, WOODROFFE and MOOKERJEE, JJ.

Reference — (a) 2 P. Wins 378, 1°.

(11) S. 60—Registered proprietor—suit for rent by—Tenant's defence on ground of title—Admissibility—Title upon which registration obtained declared void by Court

S. 60 of the Bengal Tenancy Act does not preclude a tenant defendant from proving that the title under which the plaintiff claims to hold and in respect of which he has been registered under the Land Registration Act has been held by a Court properly constituted to be void and of no effect.

Where this was proved *held*, that this was a good defence to the suit **Girish Chandra Chongdar v. Satish Chandra Sarkar**, 12 C. W. N. 622.

BRETT & SHARFUDDIN, JJ.

(11-a) S. 61—See No. 10, *supra*

(11 b) S. 67—See No. 10, *supra*

(12) Ss. 67 and 178—Interest on arrears of rent—Orissa.

In Orissa where the provisions of S. 67 of the Act have been extended but not those of S. 178, a contract may be made between a landlord and a tenant, modifying the provisions of S. 67 with regard to the payment of interest on arrears of rent **Gobinda Chandra Mahapatra v. Chaudhury Ram Chandra Nisanka Mahapatra**, 13 C. W. N. 95.

CASPIERZ and SHARFUDDIN, JJ.

(1-a) S. 69 Sub. III, Art. 2 (a)—Applicability of the section—Rent deposit of—Notice, service by post—Presumption—See CIV. PRO. CODE, No. 14, 7 C. L. J. 251

(13-a) S. 71—See No. 1 *supra*.

(14) Ss. 86, 111—Surrender by raiyat—Under-raiyat in possession having paid rent due by raiyat—Mortgage—Ejectment.

Where a raiyat surrendered his holding at a time when the holding was in possession of the under-lessee of the raiyat under S. 171 of the Act,

2.—Bengal Act—(Continued).**Act VIII of 1885 (Bengal Tenancy)—(Contd.).**

held, that the superior landlord's claim to *has* possession by virtue of the surrender should be postponed, till the amount due to the under-lessee by virtue of the mortgage under the operation of law under S. 171 is satisfied. **Nabadip Chandra Pal v. Bhairab Chandra Dhar**, 13 C. W. N. 97.

SHARFUDIN and HOLMWOOD, JJ.

(15) S. 87—Non-transferable holding—Transfer—Under-lease—Forfeiture—Landlord and tenant.

A raiyat holding a non transferable holding, having sold it to a third person, took an under-raiyat lease under him and refused to pay rent to the landlord of the raiyat holding who dispossessed him. In a suit by him to recover possession and for declaration of his title as an under-raiyat under the purchaser,

held on a review of the authorities, that plaintiff's suit ought to fail, and it was accordingly dismissed **Rajani Kanta Biswas v. Ekkari Das**, 11 C. W. N. 811 = 34 C. 689 = 7 C. L. J. 78.

RAMPINI and SHARFUDDIN, JJ.

(16) S. 87 not exhaustive—Abandonment, a question of intention—Mortgage of non-transferable holding—Mortgagee auction-purchaser—Mortgagor, interest of—Ejectment of purchaser, by landlord—Re-entry—Execution sale—Voluntary abandonment

The first sub-section of S. 87 of the Act shows that abandonment is the effect of the act of the tenant in vacating the holding, without making arrangement for payment of his rent as it falls due, and for cultivating the land.

Whether there is abandonment or not in any individual case is a question of intention to be determined upon the facts of the particular case.

In order to effect a legal abandonment and to allow a valid re-entry by the landlord, service of notice under sub-S. 2 of S. 87 of the Act is not necessary. The only effect of the service of notice is to make it obligatory upon the tenant to have a speedy determination of the question whether there has been an abandonment or not.

S. 87 of the Act is not exhaustive, and a landlord is not a wrong-doer, merely because he

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

re-enters upon the holding, before he has followed the procedure laid down in that section.

When the holding is a non-transferable one, and the ryot executes a mortgage, the mortgage, is inoperative as against the landlord, but as between mortgagor and mortgagee, the mortgage is operative (a).

Where the mortgagee of a non-transferable occupancy holding purchases the holding in execution of his mortgage-decree and takes possession, the possession of the tenant mortgagor completely ceases, and the holding passes into the occupation of the mortgagee. As against the landlord, the mortgagee auction purchaser is a trespasser. The landlord is entitled to sue him and to obtain a decree for ejectment, in such a suit the tenant who is not in occupation is not a necessary part.

Under the circumstances of the case, the abandonment of his holding by the tenant, although due to the execution-sale, is a voluntary one. **Ram Pershad Koeri v. Jawahi Roy**, 7 C. L. J. 72 = 12 C.W. N. 899.

MOOKERJEE and CASPERSZ, JJ.

Reference —(a) 4 C. W. N. 679, R.

(17) S. 88—*Sub-division of holding—Rights of purchaser—Landlord's title not questioned*

Where the landlord's rights are not questioned and he does not appear in the suit, a transferee of a share of a holding may maintain a suit against persons who claim under an inferior title, even though they may set up a recognition by the landlord. **Gour Kaibarta v. Srimati Tarajan Bibi**, 8 C. L. J. 161.

STEPHEN and HOLMEWOOD, JJ.

References —26 C. 615, D., 8 C.W. N. 55 and 9 C.W. N. 134, R', in principle

(18) Ss. 91 and 188—*Joint-owner—Joint landlord—Landlords receiving rent separately whether joint landlords.*

If one set of landlords obtains separate kabuslat entering into separate contract for rent with the tenant, such landlord ceases to be a joint landlord with the other co-proprietors of the land. He becomes a joint owner and not a joint landlord (a).

Such a landlord may apply under S. 91 of the Act for a measurement of land included in his estate. **Jognesh Prokash Ganguli v. Maniraddi**, 35 C. 417.

MITRA and CASPERSZ, JJ.

References :—(a) 7 C. W. N. 93 and 7 C.W.N. 670, referred to.

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

(19) Ss. 93 and 95—*Appointment of a successor to a common manager.*

Having once made an appointment of a common manager, under S. 95 of the Bengal Tenancy Act, it is not open to the District Judge to appoint a successor to the manager on his resignation. **Dwarka Nath Mitra v. Bankutesh Lal Mitra**, 10 C. W. N. 437 = 7 C. L. J. 109.

STEPHEN and MOOKERJEE, JJ.

(19-a) S. 95—See No. 19, *supra*.

(20) S. 103 B—*Application of—See Act I of 1873 (CHOTA NAGPUR TENANCY) No. 2, 13 C. W. N. 111.*

(21) Ss. 103 B, 105, 106, 108—*Record of rights—Suit to correct or alter entries—Maintainability*

No suit lies for the alteration or correction of entries made in the record-of-rights, published under Ch. X of the Bengal Tenancy Act. Persons aggrieved by the entries should have recourse to the special remedy provided in that chapter. **Jogendra Nath Roy v. Krishna Promoda Dassi**, 12 C. W. N. 1032 = 8 C. L. J. 322.

MACLEAN, C. J. and DOSS, J.

(21-a) S. 105—See No. 21, *supra*.

(22) Act VII of 1885 (before amendment by Act I. B. C. of 1907), Ss. 105, 106 and 108—*Record of rights—Entries as to character of holding and status of tenant—Correction of entries—Proper procedure.*

Before the passing of Act I. B. C. of 1907, an entry in a finally published record of-rights that lands held by tenants were *mal* lands or that the status of the tenants was that of settled tenants could not be corrected by the Settlement Officer, except in a suit instituted under S. 106, Bengal Tenancy Act. He had no authority to revise such an entry under S. 108 of the Act. **Sambhu Chandra Hazar v. Purna Chandra Pal**, 12 C. W. N. 122 = 7 C. L. J. 103 = 35 C. 176.

MACLEAN, C. J. and CHIBBI, J.

(23) S. 106—*Record-of-rights—Applications to correct entry, made before Amending Act of 1898—Reference to civil Court under Amending Act—Jurisdiction—Interpretation of Statute—Change of procedure during pendency of proceeding.*

A record-of-rights having been prepared in 1896, the landlord applied in 1897 for the correction of an entry, under S. 106 of the

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

Bengal Tenancy Act as it then was. After the Amending Act of 1898 was passed, the case was referred to the Civil Court under the proviso to S. 106 of the Act as amended;

Held, that the Court has jurisdiction to try, notwithstanding that the proceedings were commenced prior to the passing of the Amending Act, which first empowered a reference to the Civil Court.

In matters of procedure, an Amending Act would affect legal proceedings instituted under the repealed provision. **Rahimuddin Sarkar v. Jagat Kishore Acharya**, 12 C. W. N. 987.

COKE and RYVES, JJ

(23-i) S. 106—See Nos. 21 and 22, *supra*.

(23-ii) S. 108—See Nos. 21 and 22, *supra*.

(23 in) S. 115—See No. 7, *supra*.

(23-a) S. 120—*Zerail land—Admission—Recital in a deed—Estoppel*.

The last Sub-section to S. 120 of the Bengal Tenancy Act does not exclude evidence which under the Evidence Act is otherwise admissible.

In determining the question whether a piece of land is *Zerail* or not, *held*, that an admission in a *kabuliyat* as to the character of the land is relevant evidence. **Bhagtu Singh v. Raghunath Sahai**, 13 C. W. N. 135.

MITRA and BELL, JJ.

(23-b) S. 120—See No. 1-a, *supra*.

(24) Ss. 144, 184 and 193, Sch. III, Art 2—*Forest right, lease of—Suit for money due as price of trees—Damages for breach of contract—Suit for arrears of rent—Limitation, no admission, raised in appeal—Grant to cut timber of a certain size, of limited rights, construction of*.

A grant of the right to fell timber of a particular class and specified size during a defined period of time, though extremely restricted in its scope, which prohibited the lessee from doing any damage to the *bankar mahal*, i. e., to the forest, and imposed upon the lessee a condition to notify to the Court any occurrence which might happen and though it obviously granted no interest in the soil itself, was obviously grant of the most valuable of the forest rights; it cannot be regarded as a sale of timber (a).

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

A grant of a fishery right or right of a pasturage or the like may be made independently of an interest in land (b).

A grant of the trees as distinct from the land in which the grantor reserves every forest right except the one which is granted is nevertheless the grant of a forest right within the meaning of S. 193 of the Bengal Tenancy Act, and a suit for the recovery of money payable in respect of such forest rights is governed by the three years' rule of limitation laid down in Sch. III, Art 2, cl (b) of the Act

The provisions of the Bengal Tenancy Act applicable to suits for the recovery of arrears of rent are, having regard to the phraseology of S. 193 of the Act, designedly made applicable to suits for the recovery of sums that are not rent; and money payable in respect of forest rights is not rent within the meaning of S. 3 (5) of the Act.

The question of limitation, raised in the written statement but abandoned in the Court of first instance, is a clear question of law, and it could be raised in the Court of appeal.

Under S. 184, sub-S 1 of the Bengal Tenancy Act, it is obligatory upon the Court to dismiss the suit on the ground of limitation, although limitation has not been pleaded.

Refusal by a counsel or pleader to urge a question of law is a mere admission of law which is not binding upon the party, and the party may raise the question in appeal although not raised in the lower Court, specially where the question of limitation obviously arises upon the admitted facts of the case (d).

Although standing timber is movable property within the meaning of S. 3 of the Indian Registration Act, yet under S. 3, cl. 25 and S. 4 of the General Clauses Act of 1897, standing timber is immovable property within the meaning of the Civ. Pro. Code (e).

Growing trees may be regarded as part of the soil and consequently immovable property (f).

But were under a contract the grantee has no right to the soil, takes no interest in the land and obtains a right to the trees with a view to fell them immediately or within a reasonable time without any stipulation for the beneficial use of the soil but with a license to enter and take the trees away, the transfer

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

may be regarded as one of movables, (g). **Abdulla Sarkar v. Asraf Ali Mandal**, 7 C. L. J. 152.

STEPHEN and MOOKERJEE, JJ.

References :—(a) 23 W. R. 458, (b) 93 C 601, B; (c) 28 C. 86; 6 C.L.J. 237, R. (d) 33 C. 257; (263) 26 I. A. 216=27 C. 156, 29 I. A. 76 =25 M. 367, R. (e) Punj. Rec.; 112, 7 A. W. N. 59; 19 B. 207; 11 M. 193, R. (f) Exch. 77=86 R. R. 576; R. (g) 9 B. & C. 561=33 R. R. 259, R.

(25) S. 148—*Suit for rent—Aggregate rent—Aggregate area—Single suit—Maintainability of suit—Execution of decree.*

A landlord is entitled to bring one suit for the total rents of three separate holdings, giving the total area as the sum of three holdings. He is not bound to bring three separate suits.

The suit is maintainable, though the landlord may have difficulty in executing the decree obtained in it under the special procedure prescribed in the Bengal Tenancy Act (a). **Nanda Lal Mookerji v. Sadhu Charan Khan**, 7 C. L. J. 96.

HOLMWOOD and SHARFUDDIN, JJ.

Reference :—(a) 34 C. 298, F.

(26) S. 153—*Value of suit—Withdrawal of portion of claim—Transfer of officer specially empowered—Power, if ceases*

Where, in a suit for rent, the claim originally made exceeded Rs. 50, but, when the suit came on for trial, the claim was reduced to Rs. 7-8-0, a certain portion of the claim having been withdrawn;

Held—That, for the purpose of an appeal under S. 153 of the Bengal Tenancy Act, the amount claimed in the suit should be considered to be less than Rs. 50.

When a Munsiff is empowered to exercise final jurisdiction under S. 153, he does not cease to have the power by reason of his transfer from the station. **S. M. Shilabati Debi v. Mr. M. Y. Rodrigues**, 12 C. W. N. 448=35 C. —547.

MACLEAN, C.J., and COXE, J.

(27) S. 153—*Second Appeal—Rent, suit for.*

In a suit for rent, the defendant pleaded that the plaintiff was not, during the whole of the period for which the rent was claimed, the

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

owner of all the lands included in the tenancy, as his interest in a portion had been sold at a sale under the Public Demands Recovery Act.

Held, that a decision of the question thus raised was a question relating to the amount of rent annually payable, and an appeal lay against the decree under S. 153 of the Bengal Tenancy Act. (a) **Sani Bhusan Rudra v. Beni Madhab Samanta**, 8 C. L. J. 519.

RAMPINI and MOOKERJI, JJ.

Reference :—(a) 21 C. 722, F.

(28) S. 153, cl. (h)—*Co-sharer landlord—Suit for share of rent without making other co-sharers parties—Appeal—Second appeal—Civ. Pro. Code (Act XIV of 1882), S. 622.*

A suit by a co-sharer landlord for his share of the rent only without making the other co-sharers parties is a suit instituted by a landlord for the recovery of rent within the meaning of S. 153, Bengal Tenancy Act.

Where the rent claimed in such a suit did not exceed Rs. 50 and it was tried and dismissed by a Munsif who was specially empowered under cl. (b) of S. 153,

held, that no appeal lay to the Subordinate Judge and hence no second appeal from his decision revising that of the Munsif.

But the decision of the Subordinate Judge being without jurisdiction was set aside under S. 622, Civ. Pro. Code (a). **Bhagabati Bawa v. Nanda Kumar Chuckerbutty**, 12 C. W. N. 835.

MACLEAN C. J., and DOSS, J.

References :—(a) 12 C. W. N. 249 *applied*; and 8 C. W. N. 472 *not followed*.

(29) S. 167—*Notice, proof of service of—Validity of notice—Entries in the order-sheet of the proceedings, evidentiary value of.* See POSSESSION No. 3, 7 C.L.J. 262.

(30) S. 167—*Suit to annul encumbrances—Service of notice, decision as to—“Final decree”—See CIV. PRO. CODE, Nos. 342 and 343, 12 C.W.N. 545.*

(30-a) S. 171—See No. 14, *supra*.

(30-b) S. 178—See No. 12, *supra*.

(30-c) S. 179—See No. 4, *supra*.

(30-d) S. 184—See No. 24, *supra*.

(31) S. 188—*“Required or authorized to do”—Filing of suit—See CO-SHARERS, No. 1, 12 C.W.N. 249.*

2.—Bengal Acts—(Continued).**Act VIII of 1895 (Bengal Tenancy)—(Concl'd).**(31-a) S. 183—See No. 18, *supra*,(31-b) S. 193—See No. 21, *supra*.(32) *Sch. III, Art. 2 (b)—Limitation of rent suits—Fuslee year—Rent due on the last day of Bhadra—Period of limitation.*

The period of limitation where the Fuslee year prevails is three years from the last day of Jeith. If any instalment is due on the last day of Bhadra, the period of limitation will expire on the last day of Jeith in the third subsequent year, so that, in such a case, the suit must be brought not within three years but within two years and nine months. **Is Wardhari Singh v Ram Erich Roy**, 7 C. L. J 106.

MIRRA and ORMOND, JJ

(33) *Sch. III, Art. 3—Occupancy holding—Dispossession of raiyat by auction purchaser at sale in execution of land lord's decree—Suit to recover—Limitation.*

Where a landlord obtained a rent decree against some of the heirs of an occupancy raiyat, and certain other heirs of the raiyat were dispossessed by the purchaser at the sale held in execution of the decree,

Held, that a suit by the dispossessed heirs for the recovery of the holding is governed by the two years' rule of limitation under Art. 3, Sch. III of the Act. **Amiuddin Munshi v. Ulfatunnissa Bibi**, 19 C. W. N. 108.

RAMPINI, C. J. and DOSS, J.

Act I of 1895 (Public Demands Recovery)

(1) *Ss. 10, 12 and 31—Notice of service served on, an adult member—Meaning of "Adult"—Certificate officer—Collector of the 24 Parganas*

Where a notice under the provisions of S. 10 of the Act is, in the absence of the party to be served, left with an "adult member of his family residing with him," and such person is above the age of 16 years at the date of this service, he is an "adult" for the purposes of S. 10 of the Act. Where the object of serving a notice is to enable the judgment-debtor to contest his liability and it is proved that such notice having been served on a person alleged to reside with him, and the notice actually reaches the judgment-debtor and he contests the claim, it does not lie in the mouth of the judgment-debtor to say that the notice was not validly served, because the person on whom it was made was not proved to be residing with

2.—Bengal Acts—(Continued).**Act I of 1895 (Public Demands Recovery)—(Concluded).**

him. The Collector of 24 Parganas is the proper certificate officer to enforce the certificate against immovable property situate in Calcutta. **Hari Charan Singh v. Chandra Kumar Bey**, 35 C. 286.

MACLEAN, C. J., HARRINGTON and FLETCHER, JJ.

(2) S. 12—See No. 1, *supra*(3) S. 31—See No. 1, *supra***Act V of 1897 (Bengal Estates Partition).**

(1) *Ss. 29 & 65—Order under S. 29—Effect—See MAHOMEDAN-LAW (PRE-EMPTION), No. 195 C. 575.*

(2) *Ss. 46 and 48—Board of Revenue, rules framed by—Batwara proceedings—Rent, entries as to, payable by tenants, if evidence against tenants—Publication presumed in the absence of certificate.*

Entries in *batwara* papers as to the amount of the rents payable by tenants are evidence in the same way as entries in the record of rights prepared under Chapter X of the Bengal Tenancy Act are evidence under S. 103 B of the Bengal Tenancy Act, though they may not be very valuable evidence.

Absence of the certificate of local publication is not sufficient to show that there was no publication. A presumption should be made of the regularity of the proceedings of an officer conducting a partition. **Janki Dobey v. Kirsharath Roy**, 19 C. W. N. 93.

MIRRA and BELL, JJ

(2-a) S. 48—See No. 2, *supra*.(2-b) S. 65—See No. 1, *supra*

S. 72—Judge not to follow procedure laid down in, in making allotments, but to follow S. 396, C. P. Code. See *Civ. Pro. Code*, No. 244, 8 C. L. J. 521

Act I of 1899 (General Clauses).

(1) S. 8 cl. (c)—Effect of repeal on rights previously acquired—Act I of 1907, (Bengal), S. 54—See *Civ. Pro. Code*, No. 202, 12 C. W. N. 434.

Act III of 1899 (Calcutta Municipal Act).

(1) Agreement for lease—Contract—Calling for tenders, when obligatory—Covenant in a lease relating to the tenement—Mandamus—Matters of discretion—See *SPECIFIC RELIEF ACT*, No. 13, 13 C. W. N. 129.

2.—Bengal Acts—(Concluded).

Act I of 1903 (Bengal Tenancy Validation).

S. 1—Release by co-sharer, if transfer—Non-payment of landlord's fee, if invalidates transfer—See ACT VIII OF 1885 (TENANCY, BENGAL), No 3, 12 C. W. N. 478.

Act I of 1907 (Tenancy Amendment)

S. 54—Bengal General Clauses Act (1 of 1899), S. 8, Clause (c)—Application to set aside rent sale—Right accrued previous to Act I of 1907, but application after repeal—Effect See CIV. PRO. CODE, No. 202 12 C. W. N. 131

3.—Bombay Acts.

Act V of 1862 (Bhagdari and Narwadari)

(1) *S. J. Bhag- Sub-divisions of a Bhag- Limitation.*

Possession, acquired under an alienation, made in contravention of S. 3 of the Bhagdari Act, 1862, can become adverse and bar a suit for recovery by the individual alienor, or his representatives in interest. **Adam Umar Sale v Bapu Bavaji**, 10 Bom. L. R. 1128

BATCHLOR and HEATON, JJ.

References —4 Bom. L. R. 797, and 28 Bom. 398=6 Bom. L. R. 428. *D*; and (1879) 4 App. Cas. 324. *I*

Act XIV of 1869, amended by Act I of 1900 (Civil Courts).

S. 16—*Probate and Administration Act* (1 of 1881), Ss. 86, 51, 52—*District Judge—Assistant Judge deciding applications wherein the subject-matter does not exceed Rs. 5,000 in value—Appeal to District Court—No direct appeal to High Court—Power of local Legislature to amend an Act passed by Supreme Legislative Council—India Council's Act (55 and 56 Vic. c. 14) S. 5.*

The Probate and Administration Act, 1881, being a law made by an authority in India, is subject to the powers of repeal or amendment granted to the local Legislature by S. 5 of the India Council's Act, 1892 (55 and 56 Vic. c. 14).

Hence, the provision of the Bombay Civil Courts Act (Act XIV 1869), S. 16, by which a probate matter can be tried in the first instance by the Assistant Judge and by which the appeal in cases where the amount of the subject-matter does not exceed Rs. 5,000 will lie to the District Court, is one which the local Legislature was competent to make **Laxmi Tatyia Lugade v. Aba Appaji Lugade**, 10 Bom. L. R. 924.

SCOTT, C. J., and HEATON, J.

3.—Bombay Acts—(Continued).

Act III of 1876 (Mamlatdar's Court).

(1) *Act II of 1906—General Clauses Act (Bombay Act I of 1904), S. 7—Bombay Act II of 1906, S. 23—Proceedings commenced under the old Act—Right of appeal given by the new Act can be of no avail—Right of appeal is not a matter of procedure.*

A suit, under the Mamlatdar's Courts Act, 1876, was commenced on the 24th February, 1906. On the 29th October, 1906, the new Mamlatdar's Courts Act, 1906 came into operation which repealed the former Act. On the 26th January, 1907, the Mamlatdar dismissed the suit. The plaintiff presented, on the 12th March, 1907, a petition for revision to the Collector. It was under S. 23 of the new Act. The Collector held on the 6th April, 1907, that he had no jurisdiction to entertain the application.

Held, (1) that the repealing Act, could not give the right of revision in respect of proceedings commenced under the Act of 1876.

(2) that, on the words of the General Clauses Act, 1904, (S. 7), it would be wrong to hold that the Collector had jurisdiction, because, so to hold would be to affect a legal proceeding in respect of a right which had accrued under the old Act.

To disturb an existing right of appeal is not a mere alteration of procedure (*a*) **Nana Aba Katkar v. Sheku Andu Bokade**, 10 Bom. L. R. 930=32 B. 397.

SIR LAWRENCE JENKINS, K. C. I. E., C. J., and BATCHLOR, J.

References —(*a*) (1905) A. C. 369, followed; 9 Bom. L. R. 527 and 9 Bom. L. R. 1028 not followed.

Act V of 1878 (Abkari).

S. 16—Country liquor, attachment and sale of—Collector's permission—See CIV. PRO. CODE, No. 176, 10 Bom. L. R. 13.

Act V of 1879 (Land Revenue Code).

(1) *S. 81—Annual tenancy—Determination—Notice by landlord.*

An annual tenancy to which the Land Revenue Code applies, cannot be determined without a notice in writing by the landlord (or by the tenant). **Ochhavilal Chandraprasad v. Gopal Kalyan**, 9 Bom. L. R. 1932=32 B. 78.

SIR LAWRENCE JENKINS, C. J., and HEATON, J.

3.—*Bombay Acts*—(Continued).

Act V of 1879 (Land Revenue Code)—(Concluded).

(2) S. 176—Power of Manager, Encumbered Estates, to issue warrant of attachment on deficit on re-sale of a lease. See *BOMBAY ACT XX OF 1881*, No. 1, 2 *Sind. L. R.* 20.

Act XVII of 1879 (Dekhan Agriculturists Relief).

(1) Traders owning land whether protected by the Act—See *JURISDICTION OF CIVIL AND REVENUE COURTS*, No. 10, 6 P. W. R. 1903.

(2) *Ss. 3 and 11—Suit on mortgage against Agriculturist—Jurisdiction.*

S. 11 of the Act applies only to suits of the description mentioned in S. 3, cl. (w), i.e., to suits for money due, on account, for the price of goods sold, and on contractual engagements. Clause (y), however, of the same section refers specifically to suits for the sale of the mortgaged property. So, where the money to be recovered is charged on immovable property and the claim is to enforce that charge, the suit is excluded from the scope of the clause (w). (a)

Held that a suit against an agriculturist to enforce a mortgage claim, in the Court with- in whose jurisdiction the mortgaged property was situated, fell under the specific description in cl. (y), and that the more general description in cl. (w) was not applicable, and that S. 11 of the Act was therefore no bar to the jurisdiction of the Court. *Nur Mahomed Lalan v. Sayad Roshan Shah*, 1 S. L. R. 246.

LUCAS, J.C., and PRATT, A.J.C.

Reference.—(a) 25 B. 244 (247), R.

(3) S. 7—*Defendant, summoned for examination—Payment of batla.*

Where an agriculturist-defendant is summoned to be examined under S. 7 of the Act, it is not necessary to pay *batla* to him. *Ganga-shankar Prabhashankar v. Bodhar Madhbhai*, 10 Bom. L. R. 1163.

BASIL SCOTT, C. J. and BATHFLOP, J.

(3-a) S. 11—*Suit on commission agency account filed against an agriculturist—Decisions of Sadar Courts.*

A suit against an agriculturist on a commission agency account is barred by S. 11, Bombay Act XVII of 1879, if he resides beyond the Court's jurisdiction (a).

Judges of District Courts are bound by decisions of the Judges of the Sadar Court until questioned or overruled by the Judges exercising

3.—*Bombay Acts*—(Continued).

Act XVII of 1879 (Dekhan Agriculturists Relief)—(Continued).

the District Court jurisdiction of the Judicial Commissioner's Court. But those decisions, being the decisions of single Judges, are not binding on succeeding Judges of the Sadar Court. *Gulam Hussein Yullee v. Falib Sidik*, 2 *Sind. L. R.* 28.

HAYWARD, A. J. C.

References.—(a) Miscellaneous Application No. 10 of 1903, *Diss.* P. J. 1897, 290, F.

(3-b) S. 11—See No. 2, *supra*.

(4) *Ss. 12 and 13—Usufructuary mortgage—Redemption—Accounts taken—Result of the account.*

The provisions of S. 13 of the Dekhan Agriculturists' Relief Act, 1879, are imperative. The amount due in a suit for redemption of a usufructuary mortgage in which the provisions of S. 12 of the Act have been complied with is the amount which is found to be due upon taking accounts in the manner provided by S. 13. It is not enough that the Court should ascertain the consideration for the mortgage bond after an inquiry under S. 12 and then proceed to pass a decree for the amount. *Dadabai Muse Yalli v. Dadabhai Yalli Abhrum*, 10 Bom. L. R. 745=32 B. 516.

SCOTT, C. J., HEATON, J.

(5) *Ss. 12 & 13—Change in substantive law during progress of suit—Law applicable to the suit—See CIV. PRO. CODE, No. 232, 10 Bom. L. R. 625.*

(5 a). S. 13—See Nos. 4 and 5, *supra*.

(6) S. 15-B—*Decree for redemption—Power to order instalments—Interest provided by the decree cannot be subsequently cancelled.* S. 15-B of the Dekhan Agriculturists Relief Act, 1879, does not allow the Court to cancel a direction for the payment of interest contained in the decree.

The section says that the Court, in the course of any proceedings under a decree for sale, may, direct that any amount payable by the mortgagor under that decree shall be payable in such instalments, on such dates, and on such terms, as to the payment of interest as it thinks fit. But the interest is as much payable under the decree as the principal, and the section does not say that the Court may direct that any amount payable under the decree shall not be payable; it merely empowers the Court

3.—Bombay Acts—(Continued).

Act XXIV of 1879 (Dekhan Agriculturists' Relief)—(Concluded.)

to modify, in the particular manner there described, the terms of the payment. **Gokaldas Kala v. Govind Yiswanath**, 9 Bom. L. R. 1334—82 B. 98.

JENKINS, C. J. and HEATON, J.

(7) *Sr 15-B—Decree—Instalments—Power to award fresh instalments.*

Where a decree allowing instalments has already been obtained, S. 15-B of the Dekhan Agriculturists' Relief Act, 1879, does not permit the executing Court to reconsider the whole matter afresh with a view to the substitution of some new scheme of instalments.

The second clause of S. 15-B of the Dekhan Agriculturists' Relief Act, 1879, refers only to those cases where directions for payment have already been given under the first clause. **Shankar Shamrao v. Shankaragandayya**, 10 Bom. L. R. 538—32 B. 445.

BACHELOR and HEATON, JJ.

(8) *S. 20—Decree—Execution—Court's power to grant instalments—Civ. Pro. Code (Act XIV of 1882), S. 13—Res judicata.*

A Court has power in execution proceedings to grant instalments in the payment of a decretal debt, under S. 20 of the Dekhan Agriculturists' Relief Act, 1879, even where the instalments are refused at the time of the passing of the decree. **Bai Diwali v. Girdhar Govindram Patel**, 10 Bom. L. R. 577—32 B. 391.

JENKINS, C. J. and BACHELOR, J.

(9) Ss. 46 & 47—Manager of joint Hindu family can represent it in suits brought on behalf of it—Co-parcener can also represent if his action is consented to or ratified by his co-parceners—Conciliator's certificate obtained under S. 46 by one co-parcener as manager or with consent of other members—Maintainability of suit by co-parceners to which S. 47 of Act applies—See **HINDU LAW (JOINT FAMILY)**, No. 9, 10 Bom. L. R. 505.

(9-a) *S. 47—See No. 9, supra.*

(10) S. 63-A, signature of Registrar under—not valid attestation. See **TRANSFER OF PROPERTY ACT**, No. 30, 10 Bom. L. R. 949.

Act XX of 1881 (Sind Encumbered Estates).

S. 10—Bombay Act V of 1879, S. 176—Manager's power to recover deficit on re-sale of a lease by issuing a warrant of attachment—Receipt of money due to plaintiff by defendant.

3.—Bombay Acts—(Continued).

Act XX of 1881 (Sind Encumbered Estates)—(Concluded.)

Under S. 10, Bombay Act XX of 1881, the Manager of Encumbered Estates has the power of the Collector for the purpose of recovering rents and profits due in respect of the property under his management. The Collector has also the power under S. 176, Bombay Act V of 1879, to recover a deficit on re-sale or on arrears of land revenue by issue of a warrant.

The deficit on a re-sale of a lease, being merely damages for breach of contract to take the lease, the Manager is not authorized to issue a warrant of attachment. (a)

Where money is recovered by the defendant which, in justice and equity, belongs to the plaintiff under circumstances which render the receipt of it, a receipt by the defendant to the use of the plaintiff, the latter is entitled to recover (b). **Bachomal v. The Manager, Encumbered Estates in Sind**, 2 Sind. L. R. 20.

LUCAS, J. C. and PRATT, A. J. C.

References.—(a) 7 Bom. L. R. 1117, R; (b) 15 C. 656 & 25 M. 548, R.

Act VII of 1887 (Toda Giras allowances Act).

S. 5—Attachment and sale of Toda Giras allowance—What interest in the allowance is attachable—"Likely to become due"—Interpretation—See **TODA GIRAS ALLOWANCE**, No. 1, 10 Bom. L. R. 1201.

Act III of 1888 (City of Bombay Municipality).

(1) *City of Bombay Municipal Act (Bom. Act III of 1888), S. 354—Municipal Commissioner—Power to remove objectionable structures—Exercise of the power—"Appear," interpretation of—Danger, kind of, contemplated by the section—Discretion vested in the Commissioner—Court's interference with the discretion—Commissioner can act through agent—Right of the party to be heard in answer to his notice—Injunction to restrain Commissioner from pulling down a building.*

The primary object of section 354 of the City of Bombay Municipal Act, 1888, is the safety of the public, to secure which the Commissioner must of necessity be given very wide powers. But it does not follow that those powers must be exercised arbitrarily and without due consideration of the provisions of the section and the right of individuals. In the first place, it must appear to the Commissioner that a structure

3.—Bombay Acts—(Continued).

Act III of 1888 (City of Bombay Municipality), —(Continued).

is in a ruinous condition or likely to fall or in any way dangerous to any person occupying, resorting to or passing by such structure. He may next by written notice require the owner or occupier to pull down, secure or repair it.

The word "appear" in the section does not involve "appears to the eye." It is sufficient if it appears to the Commissioner on the representations of a competent officer whose duty it is to make such representations. But the Commissioner's action when "it appears" is judicial, so that he must exercise his discretion in determining what action should be taken. He does not satisfy this test, where he merely signs the notice which is sent to him by the Executive Engineer because it has previously been signed by that officer. It is only by aid of a fiction that it can be said that a notice signed in this way by the Commissioner complies with the section, which should be considered as a notice to show cause. It is not invalid; at the same time it cannot deprive the person served with it of his right to object unless the legislature has clearly deprived him of such a right.

Danger means peril, risk, hazard, exposure to injury from pain or other evil, and can vary in degree according as the apprehended injury is expected to occur at once or at some future time. S. 351 applying to all degrees of danger and prescribing various precautionary measures to be taken to prevent injury resulting therefrom, it follows that first the degree of danger must be ascertained and then the appropriate precautionary measure prescribed.

Discretion must not be arbitrary. The very term itself standing and unsupported by circumstances imports the exercise of judgment wisdom and skill as contra-distinguished from unthinking folly, heady violence or rash injustice (a).

The legislature has vested in the Commissioner a discretion in the matter (S. 354) and the Court would not interfere in his exercise of it merely because the object in view might be carried out in some other way, nor would it lightly impute to him bad faith. But the Court is, in the first instance, entitled to inquire whether the discretion has been exercised. The discretion has to be exercised, first in coming to a conclusion as to the state of the structure, and then in fixing upon the remedy.

3.—Bombay Acts—(Concluded.)

Act III of 1888 (City of Bombay Municipality) —(Concluded).

It is obviously impossible for the Commissioner to inspect all structures that are suspected of being dangerous. Therefore, it is a sufficient exercise of his discretion, in deciding what structures are dangerous, if he appoints a competent person to represent to him what structures are dangerous. But if a notice is issued based on the representation of such a person, it is open to the owner to prove that that person has not exercised his discretion or has been actuated by improper motives in prescribing the steps to be taken.

If the owner can prove to the satisfaction of the Court that his house was not in such a dangerous condition as to warrant an order to pull down, that would be *prima facie* evidence that the person appointed by the Commissioner had not exercised his discretion.

When the Commissioner has *per force* to act on the advice of his expert advisers, it must be proved that they decided judicially what advice they should offer. If they did not, the provisions of the section have not been complied with. In other words, the Commissioner can exercise his discretion through an agent; but it follows that, if the agent has not exercised his discretion, neither has the Commissioner. The Commissioner has the opportunity to remedy this when the owner complains.

Under certain circumstances, the safety of the public must be considered in priority to the right of private individuals as in the case of imminent danger; but where there is no suggestion of imminent danger the person affected is entitled to be heard as a matter of common justice. **Lalbahai Tricamlal v. The Municipal Commissioner for the City of Bombay**, 10 Bom.L.R. 821.

MACLEOD, J.

Reference —(c) 15 P.A.St. 304, F.

Act III of 1901 (Municipality).

(1) S. 51—Municipal Corporation acting bona fide—Imperative duty and permitted act—Karachi Municipality—Dust-bins—Nuisance—Courts, how far can interfere with acts of a Corporation.

Where the plaintiff sued for an injunction prohibiting the Municipality from placing a common dust-bin on the corner of a garden immediately in front of his house, held, that as

3.—Bombay Acts—(Continued).**Act III of 1901 (Municipality)—(Continued.)**

S. 54 of Bombay Act III of 1901 imposed an imperative duty on the Municipality to make reasonable provision for cleaning public streets, as the streets could not be kept clean, under the circumstances obtaining in Karachi, without keeping dust-bins in some specified spaces: and as it was not shown that the Municipality was either negligent or not acting with *bona fides* in placing one at the particular site, the plaintiff was not entitled to the injunction sought for, although the dust-bin in this instance was a source of nuisance to him.

Held, also, that to ascertain whether or not a nuisance is such as to give one a right of action, inquiry should be made into the authority under which the Municipality purported to act, the law on which point may be thus summarised

(1) Apart from the terms of the statute which constitutes it, the corporation has no more authority to infringe a private right than the ordinary citizen.

(2) The corporation can do an act which constitutes a nuisance, if, and only if the power to do the act is expressly set forth in the statute or is necessarily deducible therefrom.

(3) Where the corporation has merely permissive and not imperative authority to do a thing, the inference is that the discretion should be so exercised as not to prejudice the common law rights of others.

(4) If the corporation acts within its express or implied authority without negligence and with *bona fides*, no action lies against it at the suit of a person who sustains a private injury by its exercise.

(5) The Courts put a wider and more liberal construction on the powers vested for the benefit of the public as a body such as a Municipal Corporation. **Hanaraj Hirji v. The Karachi Municipality**, 1 Sind L R. 228.

CROUCH, A.J.C

(2) S. 160—Municipality—Acquisition of land—Proposal to acquire—Acceptance of proposal—Inference as to price—Completed contract—The price can be fixed by the Court in cases of difference.

The Poona City Municipality having determined to acquire a portion of the plaintiff's house for the purpose of widening a street, the plaintiff expressed his willingness to allow the Municipality to acquire the same; but they

3.—Bombay Acts—(Continued).**Act III of 1901 (Municipality)—(Concluded).**

could not agree as to the price. The question was referred to arbitration as required by S. 160 of the Bombay District Municipal Act, 1901; but the proceedings before the arbitrators were not successful. The plaintiff then applied to the District Judge, under S. 160 (3) of the Act, requesting him to ascertain and determine the compensation payable. The District Judge made his award. The Municipality appealed from the award contending that they no longer required the plaintiff's premises and that there never was a completed contract with the plaintiff.

Held, (1) that there was a contract of sale at a fixed valuation, where the Court not only can provide, but under a special statute is compelled to provide, the means of ascertaining the price, and of such a contract specific performance would be awardable.

(2) that, therefore, there was a contract between the parties from which the Municipality could not recede

As a general rule where the agreement is that the price of the estate shall be fixed by arbitrators and they do not fix it, there is no contract, as the price is of the essence of the contract of sale, and the Court cannot make a contract where there is none. But the applicability or otherwise of this doctrine depends upon whether the fixing of the price is of the essence of the contract of sale (a)

Where there is a definite and a completed contract to give and take the estate upon terms to be settled thereafter and the valuation cannot be made *modo et forma*, the Court will substitute itself for the arbitrators (b). **The Poona City Municipality v. Ramachandra G. Karve**, 10 Bom L. R. 617.

BATCHELLOR and HEATON, JJ.

References —(a) 19 Ves. Jun, 429, *F*; and (b) 5 Ch App. 519, *referred to*.

Act I of 1904 (General Clauses, Bombay).

S. 7—Proceedings commenced under the old Act—Right of appeal given by the new Act, whether can be of any avail—Right of appeal, not a matter of Procedure—See Act III of 1876 (MAMLATDARS COURTS), No. 1. 10 Bom. L. R. 330.

3.—Bombay Acts—(Concluded).**Act II of 1906 (Mamlatdar's Courts).**

(1) S. 19 (b)—*Landlord and tenant—Determination of the tenancy—Trespasser getting into possession during the tenancy—Possessory suit against trespasser at the determination of the tenancy.*

The plaintiff let his lands to defendants Nos. 1 and 2 on the 5th June, 1905. In November, 1905, the defendants Nos. 1 and 2 were dispossessed by a trespasser, defendant No. 3. The tenancy ended on the 6th June, 1906. On the 29th October, 1906, the plaintiff filed a suit in a Mamlatdar's Court to recover possession of the lands from defendants Nos. 1-3. It was contended by defendant No. 3 that the Mamlatdar had no jurisdiction to try the suit so far as it affected her.

Held, that a trespasser like defendant No. 3 could not defeat the right of the landlord to recover immediate possession of the land on the determination of defendant No. 1 and 2's tenancy by resorting to the summary remedy given by the Mamlatdar's Courts Act, 1906;

(2) that the plaintiff's remedy having been to bring his suit under S. 19 cl. (b) of the Act, on the expiry of the tenancy, the fact that a trespasser got into possession during the continuance of the tenancy, but more than six months before its determination, is not sufficient to oust the Mamlatdar's jurisdiction.

The Mamlatdar's Act is a remedial measure and must be liberally construed so as to advance the remedy. **Deu Dada Gavil v. Sitaran Chinnaji**, 9 Bom. L. R. 1179—32 B. 46.

*CHANDAVARKAR and KNIGHT, JJ.

4.—Burma Acts.**Act II of 1876 (L. Burma Land and Revenue Act).**

See SPECIFIC RELIEF ACT, No. 10-a, 14 Bur. L. R. 277.

Act III of 1898 (Burma Municipality).

(1) Ss. 46 (1) (A) (a) 68, 69—*Street Tram Lines—Buildings and lands within the meaning of section—Tramway Company whether occupiers of land on which Tram lines are laid within meaning of Ss. 68 & 69.*

The tram lines in a certain street, meaning thereby the land of the street, in or on which the Rangoon Electric Tramway Company's sleepers and rails are laid, is land within the meaning of cl. (a) of division A of Sub. S. (1) of S. 46 of the Burma Municipal Act.

4.—Burma Acts—(Concluded).**Act III of 1898 (Burma Municipality) (Concluded).**

The Tramway Company are occupiers of the portion of land upon which they have laid the tram rails within the meaning of Ss. 68 & 69 of the Act (a). **The Rangoon Electric Tramway and Supply Co., Ltd. v. The Rangoon Municipal Committee**, 14 Bur. L. R. 223=4 L. B. R. 220.

FOX, C. J., IRWIN and HARTNOLL, JJ.

References—(a) L. R. 9 Q. B. 9 & L. R. A. C. 153, P.

(2) S. 68—See No. 1, *supra*

(3) S. 69—See No. 1, *supra*.

Act XIII of 1898 (Burma Laws).

S. 13 (2)—Questions arising in civil cases in the Courts of Rangoon—By what law, determined—Common law of England—See **CARRIERS**, No. 2-a, 14 Bur. L. R. 77.

5.—Central Provinces Acts.**Act XVIII of 1881 (C. P. Land Revenue).**

(1) *Malik-makbusa—Malguzar—Whether two estates can be held by same person—Merger—Whether transfer of one affects the other.*

The object of the definition of "*Malik makbuz*" in the Central Provinces Land Revenue Act of 1881 is merely to distinguish it from all the other kinds of revenue-paying proprietors who may be found in the village. But this does not imply that the same person may not simultaneously possess two distinct estates under different forms of ownership, even in the same *mahal* in cases where the doctrine of merger does not apply.

The estates of *malik makbuz* and *Malguzar* in the same *mahal* are distinct from, and independent of, one another. And the possession of both by the same person does not produce a merger of these estates.

It is competent for a person in the Central Provinces to be at once a *Malguzar* and a *Malik-Makbuz* in the same *mahal*; and transfers of either one of these estates has no effect upon the ownership of, and legal rights and liabilities appertaining to, the other estate. **Mt. Munkoo v. Mt. Kuksoo**, 4 N. L. R. 2.

STANYON, SECOND AD. J. C.

Act IX of 1883 (C. P. Tenancy).

(1) *Agricultural tenancy, devolution of—Applicability of Hindu Law.*

5.—Central Provinces Acts—(Continued).**Act IX of 1883. (G. P. Tenancy)—(Continued).**

Agricultural tenancies in Central Provinces are created by contract and statute, and their devolution is governed by the same statute. The Tenancy Act does not recognize such things as succession by right of survivorship, the vesting of a son's interest by birth, and so on. In the case of Hindus, the Courts, in dealing with agricultural holdings, will follow the Hindu law of inheritance so far as it may be consistent with the principles of the Tenancy Act and no further: and the peculiar feature in the former, under which a son gets by birth a vested interest in the property of his father which controls the father's power over such property, has no place in the latter. **Ghanya v Ukund Rao**, 4 N.L.R. 9.

STANFORD, A. J. C.

- (2) S. 41 (i)—*Absolute occupancy tenant, transfer of holding by—Conditions under which transfer can be avoided—Statutes interfering with private rights, construction of.*—

Where an absolute occupancy tenant had made a transfer of his holding, the transfer can be avoided, under S. 41 (7), of the Central Provinces Tenancy Act, 1898, only by the whole proprietary body acting together, (a) or by an agent who is authorized to act on their behalf and whose authority should not have been revoked in regard to the particular transfer in dispute. A transferee cannot be disturbed, under S. 41 (7), if even one of many persons composing the body of landlords refuses to join in avoiding the transfer, (b) and a suit to avoid the transfer was, under the circumstances, dismissed.

Statutes interfering with private rights of alienation should be strictly construed (c). **Ramji Patel Kanbi v Syed Nur**, 4 N.L.R. 45.

DRAKE-BROCKMAN, J. C.

References :—(a) 13 C. P. L. R. 113, S. A. No. 20 of 1906 of the J. C. S. Court, Central Provinces, *F*; 12 C. W. N. 249, 14 C. 201, 2 N. L. R. 45 (47), *R*. (b) S. A. No. 20 of 1906, *F*, 16 C. P. L. R. 135 (139), 14 C. P. L. R. 129, *R*, 20 W. R. 126, 7 C. 414, 2 C. W. N. 229, *R*, and *Distd*. (c) 7 A. 702 (707), *R*.

(3) S. 43, Act XVII of 1899 (Central Provinces Tenancy), S. 45, cls. 3 & 47—Transfer of part of occupancy holding—Jurisdiction of Civil Courts to entertain suit for ejectment—See JURISDICTION (OF CIVIL AND REVENUE COURTS), No. 4, 7 C. L. J. 499.

5.—Central Provinces Acts—(Concluded).**Act IX of 1883 (G. P. Tenancy)—(Concluded).**

- (4) S. 92—*Decision of Tahsildar that a person is tenant—Res judicata—Jurisdiction of Civil Court.*

The second clause of S. 92 of the Tenancy Act is enabling or explanatory, and is not exhaustive. A Tahsildar's decision, that a person is a tenant, is not *res judicata* so as to bar the trial of the issue, whether he is tenant or not, in a civil Court. The fact that a Tahsildar has, under S. 92, reinstated a person as a tenant does not bar a civil Court from deciding whether the landlord has the right to evict that person as a tenant, and still does it bar a civil Court from deciding whether the person is a tenant or not when the landlord brings a suit to eject him as a trespasser. In other words the fact that a Tahsildar has put a person into possession under S. 92, does not make that person a tenant if he is not a tenant. **M. T. Durbasa v. Khalaksing**, 4 N. L. R. 63.

BATTEN, A. J. C.

Act XI of 1898 (Tenancy, Central Provinces).

- (1) S. 2, cl. (10)—Holding of survey number—Proceedings in Court—See JURISDICTION (GENERAL), No. 5, 8 C. L. J. 116.

- (2) S. 46, sub-S. 3—Ejectment—Grant of sub-lease by tenant—See EJECTMENT, No. 3, 8 C. L. J. 156.

6—Madras Acts**—Act XXIV of 1839.**

S. 3, Rule X, cl. 4—Agent to the Governor at Vizagapatam—Principal Civil Court of Original Jurisdiction. See ACT VII of 1889 (SUCCESSION CERTIFICATE), No. 2, 18 M. L. J. 252.

Act II of 1864 (Madras Revenue Recovery).

- (1) S. 35—*Who may be called "defaulter"?*

According to S. 35, Act II of 1864, persons, even though they are not pattadars, may come under the category of "defaulters". (a) *Per Munro, J.*

The word "defaulter" refers to the registered landholder and to him alone. (b) *Per Pinhey, J.*, **Subramania Chetty v. Mahalinga Swami Sivan**, 4 M. L. T. 469.

MUNRO AND PINHEY, JJ.

References :—(a) 30 M. 35, *R*, (b) 30 M. 35, 11 M. 452, 17 M. 247, *R*.

- (2) Ss. 36, 38 and 40—Sale of immovable property—Application by purchaser for delivery of possession—Limitation—Limitation Act, Arts. 178, and 179.

6.—*Madras Acts—(Continued).*

Act II of 1864 (Madras Revenue Recovery)—*(Concluded).*

Where immovable property has been sold under S. 36 of the Revenue Recovery Act, and an application is made by a purchaser for delivery of possession under S. 40 of the Act, the period of limitation for making the application is governed by Art. 178 and not by Art. 179.

S. 40 of the Revenue Recovery Act places the purchaser in the position of a decree-holder for the purpose of putting the machinery of the Court in motion, in order that the certificate of sale granted by the Revenue authority may be given effect to. It does not, by implication make the law of limitation, with reference to the execution of decrees or orders of Civil Courts applicable to processes under S. 40 of the Act. **Sambasiva Mudallag v. Panchanada Pillai**, 17 M. L. J. 441-3 M. L. T. 19-31 M. 24.

References—16 M. L. J. 431, 17 C. 491, 24 C. 473, *Expl.*, 8 M. 207, 17 M. 379 and 29 M. 529, R.

(3) S. 38—See No. 2, *supra*.

(4) S. 40—See No. 2, *supra*.

Act VIII of 1865 (Rent Recovery).

(1) *Judgment in Civil suit—Distraint for rent, validity of—Merges of cause of action.*

The judgment in a Civil suit for rent merges the cause of action for rent, and such rent can no longer be distrained for, under the provisions of the Rent Recovery Act, if the judgment is executable and stands unversed at that time, although, subsequently, the judgment may be reversed on appeal.

The doctrine of merger under this circumstance is an application of the maxim *nemo debet bis vexari pro una et eadem causa*, which is applicable to the circumstances of this country. **Chinnappa Rowther v. Robert Fischer**, 17 M. L. J. 411-30 M. 495-3 M. L. T. 22.

BENSON and WALLIS, JJ.

References—17 M. L. J. 295, 9 T. L. R. 568, (1884) 13 M. and W. 494-67 R. R. 694 (1895), L. R. 1 Q. B. 108 and (1903) 3 East 251-7 B. R. 449, R.

(2) *Voluntary fees Validity of their inclusion in pattah—Prior suit against tenant—Failure to object to include voluntary fees—Res-judicata.*

6.—*Madras Acts—(Continued).*

Act VIII of 1865 (Rent Recovery)—*(Continued).*

Fees paid by tenants for temple, which are *prima facie* of a voluntary character, cannot be included in the pattah, unless they are shown to be a charge on the land or to be payable with the rent, according to established law and usage (a).

Where, in a former suit against the tenants, they did not object to the inclusion of those voluntary fees in the pattah as a defence in the suit, held, that the decision in the prior suit rendered such a defence in a subsequent suit *res-judicata* (b) **Sellappa Chetty v. Velayutha Tevan**, 17 M. L. J. 433-30 M. 498-3 M. L. T. 17.

BENSON and WALLIS, JJ.

References—(a) 17 M. 43, R, (b) 13 M. 287, R.

(c-a) *Supply of water at tenant's request—landlord's share, half the produce—Liability to water-tax proportionate.*

Where the landlord is allowed by the tenant one half of the produce raised with the water supplied at the tenant's request, the landlord ought to bear his proportion of the water rate, on the principle of *qui commodum sentit sentit debet et onus*, or in other words, the benefit and the burden should go together **Darapu Reddi Subramaniam v. Suri Venkatasubbaraya Sastri**, 18 M. L. J. 563.

SUBRAHMANYA AIYAR and WALLIS, JJ.

(3) S. 7—*Landlord and tenant—Muchilika, acceptance of, by landlord, effect of.*

In the absence of an agreement to dispense with a pattah, mere acceptance by the landlord of a muchilika executed by the tenant is no sufficient proof that pattah has been dispensed with (a). **Erlagudda Mallikarjuna Prasada Naidu Bahadur Zamindar Garu v. Moolupuri Papayya**, 3 M. L. T. 280.

BENSON and MUNRO, JJ.

References—(a) 3 M. 255 & 10 M. 363, F.

(4) Ss. 9 and 72—*Dismissal of a revenue suit for enforcement of acceptance of pattah—Civil suit for rent on the basis of tender of proper pattah—Res-judicata.*

A decision of the Revenue Court dismissing a suit for the enforcement of acceptance of pattah, under S. 9 of the Rent Recovery Act, would not operate as *res-judicata*, in a civil suit for the same fasli based on the tender of

6.—Madras Acts—(Continued).

Act VIII of 1865 (Rent Recovery).—(Contd).

the proper patta, as the Revenue Court has no jurisdiction to decide such suit for rent (a).

If, instead of dismissing the suit, the Revenue Court has settled the terms of the patta, the terms so settled would have constituted the final contract between the parties as to rent for the year, and the civil Court would have been bound to enforce this contract under S. 72 of the Act (b). **Kedambi Venkatachari V. Lakshmi doss** 17 M. L. J. 601=3 M. L. T. 106.

WALLIS and MILLER, JJ.

References --(a) 20 M. 392, 29 C. 707 (P.C.). 25 A. 189, (b) 27 M. 75, *Expl.*

(5) S. 11—Zamindari lands—Raising of second crop by tenants on punjai (dry) land—Custom—Onus of proof—Enhancement of rent on account of tenant's improvements.

The burden of proving that punjai or dry land is liable to a charge for second crop, when irrigation is carried on with the aid of the tenant's well lies on the Zamindar. In the absence of proof of such custom, such charge is an enhancement of rent on account of the tenant's improvements within the meaning of S. 11 of the Act. **Kumara Reddi v. Thumbichai Naicker**, 17 M. L. J. 513=3 M. L. T. 101=31 M. 17.

WALLIS and MILLER, JJ.

Reference --21 M. 136, *P.*

(6) S. 11, Prov. 1—Improvements by tenants—Claim to increased rent—Varying rates under old waram system according to nature of crop—Public Policy.

The proviso to S. 11 of the Act reserves the right of the land-holder, with the Collector's consent, to raise the rent in consequence of additional value imparted to the land by means of improvements effected at his own expense, or by Government, where Government has required him to make an additional payment in consequence of such improvements, and, by implication, the proviso negatives any right on the part of the land-holder to claim increased rent in consequence of improvements effected by the tenant (a).

It is not opposed to public policy or to the provision of the first proviso that, where money assessments were substituted for waram, the incidents of the old waram system should be

6.—Madras Acts—(Continued).

Act VIII of 1865 (Rent Recovery).—(Concluded).

perpetuated by charging varying rates according to the nature of the crop, without regard to the question whether the crops are raised by the aid of tenant's improvements or otherwise. **Suppa Pillai v. Thumbichai Naiker**, 17 M. L. J. 511=3 M. L. T. 103=31 M. 19.

WALLIS and MILLER, JJ.

References --21 M. 136 and 28 M. 328, *Expl.* (6-i) S. 14—See No. 7, *infra*.

(6-ii) S. 16—See No. 7, *infra*.

(6-a) S. 38 Summary proceedings against transferor no bar to proceedings against transferee tenant.

The proceedings against the transferee tenant, to whom proper pattas have been tendered, will not be barred by the fact that the landlord took summary proceedings against the former owner (transferor). **Robert Gordon Orr v. Chokalingam Pillai**, 4 M. L. T. 193.

WALLIS and MILLER, JJ.

Reference --7 M. 31, *P.*

(7) Ss. 39, 16 and 14—Attachment for larger amount than that due as rent—Validity.

An attachment for a larger sum than that actually due as rent is not invalid, but is good to the extent of the rent found to be due on correct calculation, in case the patta is correct and has not been altered by the Court. It may be otherwise when a sale takes place under such circumstances. **Periakaruppa Pillai v. Miller**, 17 M. L. J. 479=3 M. L. T. 29=31 M. 22.

BENSON and MILLER, JJ.

References --26 M. 260, 29 M. 75, *D*; 10 M. 229 *P.*, 25 M. 613, 27 M. 465, *P.*

(7-a) S. 72—See No. 4 *supra*.

(8) S. 85—Receiver appointed by Court—Necessity for leave to sue him—Effect of section.

A receiver appointed by Court is a public officer holding lands in attachment under the order of a Civil Court, within the meaning of S. 85 of the Act. He is, by virtue of the section, to have all the powers of a land-holder and be subject to the same restrictions. The effect of the section is to give a statutory right of suit against him, and leave of the Court is not necessary. **Kuppusawmy Iyer V. Suppan Chetty**, 17 M. L. J. 483=30 M. 505=3 M. L. T. 7.

BENSON and WALLIS, JJ.

6.—Madras Acts—(Continued).**Act IV of 1884 (District Municipalities).**

- (1) *Ss. 3 & 60—What are municipalities—Exemption from payment of profession tax.*

A certain person claimed exemption under S. 60 from payment of profession tax, to the Bellary Municipality on the ground that, during the half-year, he paid "profession tax" to the Bellary Cantonment. *Held*, that the Bellary Cantonment, not having been declared a municipality under Cl. (14) of S. 3, was not a municipality constituted under the Act, and therefore the payment made by the defendant to the Bellary Cantonment, not having been made to any other municipality, does not, under S. 60, exempt the defendant from his liability to pay to the Bellary Municipality. **The Bellary Municipal Council v. Sarkiss**, 4 M. L. T. 477.

PINNEY, J.

- (2) *S. 26—Reg. VII of 1817—Mismanagement of trust—Management made over to Municipality—Assignment of properties and documents belonging to trust—Suit by Municipal Council on a mortgage document—Assignment whether should be in writing*

On account of the mismanagement of a choultry by its trustee, its management and superintendence were made over to a Municipal Council, to which the trustee gave up all the property belonging to the choultry including sundry documents. The Municipal Council brought a suit on one of these documents, a mortgage bond.

Held, the Council could maintain a suit without an assignment in writing of the bond (a). **The Chairman, Municipal Council of Rajahmundry v. Susurla Venkateshwarulu**, 3 M. L. T. 241=31 M. 111.

MILLER and MUNRO, JJ.

Reference:—(a) 12 M. 366 (368), R.

- (2-a) S. 60—See No. 11, *supra*.

- (3) *Ss. 85 and 88—Registration of cart—Obliteration of number.*

Where the plaintiff removed the portion of the axle, on which the registration number had been painted, from a damaged wheel, and affixed it to the repaired axle, *held* that, when the registration number has been affixed in this manner, the cart bears the registration number for the purposes of S. 85, and the registration

6.—Madras Acts—(Continued).**Act IV of 1884 (District Municipalities)—(Concluded).**

number is kept affixed for the purposes of S. 88, unless such affixing is contrary to any by-law of the Municipality or a direction given by the Municipality under S. 85. **C. R. Srinivasa Chariar v. The Municipal Council, Kumbakonam**, 3 M. L. T. 405=18 M. L. J. 377.

WHITE, C. J. and BODDAM, J.

- (4) S. 88—See No. 3, *supra*.

Act V of 1884 (Local Boards).

- (1) *Duty of maintaining roads—Necessary consequences of such duty—Construction of water-ways necessary to enable road to be safely carried across drainage of country—Extent of authority conferred on Local Boards to construct roads.*

The duty cast upon Local Boards of maintaining a public road necessarily involves the duty of maintaining the necessary culverts and tunnels under it. An authority to construct a "road" carries with it the authority to construct the water-ways necessary to enable the road to be carried safely across the drainage of the country, and the same rule applies in the case of a road which was vested ready made in the District Board by the Local Boards Act, 1884.

The Madras Local Boards Act, 1884, enjoins the maintenance of the road and does not confine the Board to its maintenance as originally designed and executed, and, in the absence of any such express restriction, the injunction to maintain imposes the duty to provide such new works as may be found necessary from time to time to provide, in order that the road may be properly maintained (a).

Held, that, in the absence of negligence on the part of a District Board in the carrying out of the work of the repair of a road and of proof that the Board could have constructed a culvert at any part of the road, other than that in dispute, which, while effective to protect the road, would have done no injury to the plaintiffs' lands, they were not entitled to an injunction against the District Board restraining it from increasing the size of the culverts passing under the road. **Alyasawmi Aliyar v. The District Board, Tanjore**, 18 M. L. J. 91=31 M. 117.

WHITE, C. J. and MILLER, J.

6.—Madras Acts—(Continued).

Act V of 1884 (Local Boards)—(Continued).

References :—(a) 28 M. 72 and (1889) A. C. 535; distinguished; (1886) 11 A. C. 435, L. R. 4 C. P. 629 and 6 Ch. D. 521, R.

(2) S. 156 (1) and (3)—*Suit for injunction—Maintainability—No notice—Limitation.*

Notice of action is not necessary, under S. 156 (1) of the Act when the suit is for an injunction. And the six months' limitation, prescribed by S. 156(3), does not apply to such a suit.

Govinda Pillai v. Taluq Board, Kumbakonam. 4 M. L. T. 209 (F B)

WHITE, C. J., SANKARAN NAIR AND PINHEY, JJ.

References — 29 M. 339, 16 M. 317, 5 Ch. D. 347, 20 Eq. 626, 14 Q. B. D. 928, 23 Q. B. D. 294, 16 M. 296, 16 M. 474, 22 B. 605, 21 Ch. D. 484, 22 B. 289, 3 M. L. J. 223, F. 18 B. 19, not F.

(3) Ss. 162 and 165—*Agreement for collection of fees in a market—Construction—Penalty—S. 74 of the Contract Act—Limitation Act, Arts. 68 and 115—Felony act—Civil suit without criminal prosecution.*

Even if it be an established principle of the law of England, that the policy of the law will not allow a person injured by a felonious act to seek civil redress, if he has failed in his duty of bringing or endeavouring to bring the felon to justice, as to which there seems to be some doubt, the principle does not apply to a case, where the defendant is not criminally liable for the offences committed by his agent, and the suit is not brought against the party, who is alleged to have been guilty of an offence under S. 165 of the Local Boards Act (V of 1884) (a).

An agreement by the defendant with the President of the Taluq Board in respect of the collection of fees in a market, provided, among others, "If I, my agent, or servant, were to act contrary to the above regulations, I shall be liable to pay a fine not exceeding Rs. 50 imposed by the President of Taluq Board, or I am not entitled to object, if my *gutta* is put up for auction again (myself being)", subject to the loss that may be sustained by the Taluq Board."

Held, (1) that the agreement in question is not an instrument of the same nature as a bail bond or recognizance, within the meaning of the exception to S. 74 of the Contract Act. It is a bond given for the performance of a public

6.—Madras Acts—(Continued).

Act V of 1884 (Local Boards)—(Concluded).

duty or act in which the public are interested (b) But there is no section in the Local Boards Act, which authorizes or requires the giving of such bond. (2) Under S. 74 of the Contract Act, it is open to the Court to award the party complaining of the breach reasonable compensation not exceeding the amount named in the bond, without reference to any actual loss sustained by the Board. (3) The extortion of unauthorized tolls, from the class of persons, who make use of the market is a serious offence, and the amount of penalty specified in the bond is recoverable as compensation. (4) A suit for the recovery of the penalty is governed by Art. 68 or Art. 115 of the Limitation Act and not by Art. 6 of the Act. (5) The provision authorizing the plaintiff to put the defendant's *gutta* up to auction does not preclude the plaintiff from recovering upon his contract. (6) The penal clauses of the Local Boards Act, S. 162 (c) and (d) do not preclude the plaintiff from recovering under his contract with the defendant. **Taluk Board, Kundapur v. Lakshmi Narayana Kamphli**, 17 M. L. J. 537 = 2 M. L. T. 161

WHITE, C. J.

References — (a) 10 Ch. D. 667, 9 M. 463, R. (b) 16 M. 175, R.

(4) S. 165—See No. 3 *supra*.

Act I of 1887 (Malabar Compensation for Tenants' Improvements).

(1) S. 7—*Act of 1900, S. 19—Contract before 1886—Compensation, rate of—Whether governed by the terms of the contract.*

S. 7 of the Act of 1887 which is re-produced as S. 19 of the Act of 1900 precludes parties from contracting themselves out of the Act by any contract made after January 1st, 1886, but it does not affect the validity of contracts made prior to January 1st, 1886, whether the improvements are made before or after the coming into operation of the Act of 1887.

Hence in the case of a contract made prior to January 1st 1886, the rate of compensation is governed by the terms of the contract (a). **Randupural Kunhi v. Neroth Kunhi Kannan**, 3 M. L. T. 291 = 18 M. L. J. 98.

WHITE, C. J., WALLIS and SANKARAN NAIR, JJ.

References — (a) 3 M. L. J. 52, R.; 21 M. 149 13 M. 502, D.

6.—Madras Acts—(Continued).**Act IV of 1899 (Salt).**

- (1) *S. 87—Contract to transport Government salt—Suit to recover sums deducted under the terms of the contract—Maintainability.*

Where any officer does anything in pursuance of any provision of the Act, and he is authorised to do it by the same Act, then no suit will lie against him under S. 27 of the Act, even if any person suffers any damage, and an action might otherwise be maintainable.

But where the officer in his capacity of public officer purports to do the act complained of in pursuance of any provision of the Act, with reasonable grounds for believing that he is authorized by the Act to do it, or does it irregularly or improperly so as to cause injury to any person, then a suit may lie against him, but it must be brought within the time limited by S. 87. But where the act complained of which is alleged to give rise to the cause of action is not done nor is purposed to be done under any section of the Act, S. 87 does not apply.

So, the section does not bar a suit on a contract brought against the Secretary of State for recovering certain sums deducted with reference to the contract and certain sums spent in performing the contract, if such sums can otherwise be recovered. **Muthia Chettiar v. Secretary of State**, 1 M. L. T. 221.

SANKARAN NAIR and ABDUR RAHIM, JJ.

References —2 M. 125, 22 M. 524, F.

Act II of 1894 (Proprietary Estate's Village Service).

- (1) *S. 13—Inam attached to hereditary village office—Enfranchisement—Pattah granted in the name of one, not the registered holder of office—Suit by registered holder for recovery of the Inam—Maintainability.*

Mere registration under S. 13 of the Act is not enough to support a claim for the man lands attached to an office so registered. The effect of such registration is merely to declare that the person registered is entitled, on attaining majority, or within three years thereafter, to be appointed to the office, provided he is duly qualified.

Where man lands attached to such office were subsequently enfranchised and pattah thereof had been issued in the name of one who was not so registered, it was held that the

6.—Madras Acts—(Continued).**Act II of 1894 (Proprietary Estate's Village Service).—(Concluded).**

person so registered cannot recover (a). **Déva guptapu Peda Satyanarayana v. Gopalapati Sarasamma**, 4 M. L. T. 282.

MUNRO and ABDUR RAHIM, JJ.

Reference —(a) 8 M. 249 (263), R.

Act IV of 1899 (Court of Wards).

- (2) *S. 10—Court of Wards—Reg. V of 1804, S. 30—Regulation Collector—Decree Collector—Construction of the Act and Rules thereunder—Limitation Act, Ss 1 and 14—Claim in time, but referred after being barred—Right of suit*

When the Decree Collector calls on the Regulation Collector to furnish particulars of a claim, then in time, the latter should not keep the claim pending and dismiss it as being time barred.

The construction of the Court of Wards Act and of the Rules framed thereunder is not free from difficulty.

If a claim be disallowed by the Regulation Collector and the Court of Wards, (there being no Decree Collector) the claimant's only remedy is to file a suit in the Civil Court as contemplated in S. 10 of the Act. S. 4 of the Limitation Act will be a bar, unless such suit were instituted within the time allowed by law.

The Regulation Collector is not "a Court" within the meaning of S. 14 of the Limitation Act, "which from defect of jurisdiction is unable to entertain" the claimant's suit. Provision should be made by the Legislature for excluding the period during which the claim was pending before the Regulation Collector.

But where there is a Regulation Collector and a Decree Collector in existence before the making of the claim, the only question of limitation to be decided by the Civil Court is whether the claim was not barred at the time when it was made. If it was not irrecoverable when made and if the sum was then otherwise legally due the Decree Collector must admit the claim and discharge it to the extent of assets in his hands.

The Decree Collector, when in doubt, is bound to refer the matter to the decision of a Civil Court. Such reference by the Decree Collector being made under a special provision of Law. S. 1 of the Limitation Act does not apply

6.—Madras Acts—(Concluded).**Act IV of 1899 (Court of Wards)—(Concluded).**

thereto. **The Regulation Collector of Uthamalai Estate v. Subbier**, 4 M.L.T. 321.

BENSON and MUNRO, JJ.

Act I of 1902 (Court of Wards)

SS. 18, 43, 55 and 57—See MORTGAGE (USUFRUCTUARY), No. 4, 4 M. L. T. 341.

Act III of 1904 (Madras Municipal Act).

(1) *Sch. V—“Capital,” meaning of—Indian Companies Act.*

The Indian Companies Act cannot be properly resorted to for determining the meaning of words in the Municipal Act, as the two Acts are not in *pari materia*.

When Sch. V of the Municipal Act is read as a whole, the underlying principle seems to be that taxation should be roughly proportionate to the professional incomes of individuals and the profits of Companies.

The word “Capital” in Sch. V means paid-up capital. **The Mylapore Hindu Permanent Fund, Ltd v. The Corporation of Madras**, 3 M. L. T. 400—18 M. L. J. 349—31 M. 408.

BENSON and MUNRO, JJ.

References—11 M. 238, 11 M. 253, 28 M. 17, R.

(2) *Sch. VI, Cl. 1—“Trailer Cars” Vehicles with springs—“Propelled”*

Trailer cars are vehicles with springs and are ‘propelled by electricity,’ within the meaning of the words as used in Sch. VI, Cl. 1 of the Madras City Municipal Act, 1904, and, as such, liable to pay a tax of Rs. 15 each to Municipality.

The Madras Electric Tramways Co., v. The Madras Corporation, 18 M. L. J. 119.

BENSON and MUNRO, JJ.

7.—North West Provinces Acts.**Act XIX of 1873 (Land Revenue)**

(1) *SS. 132 and 211—Act (Local) No. III of 1901 (United Provinces Land Revenue Act), S. 233 (k)—Partition—Civil and Revenue Courts—Jurisdiction.*

A plaintiff came into Court upon the allegation that a certain grove had upon partition been wrongly allotted to the defendants’ mahal whereas it should have been allotted to his (the plaintiff’s) mahal, and he claimed a decree for a declaration of his title or for possession. *Held* that Section 233 (k) of the United Provinces

7.—North West Provinces Acts—(Contd.).**Act XIX of 1873 (Land Revenue).—(Concl'd.).**

Land Revenue Act, 1901, barred the cognizance of such a suit by a Civil Court. **Jagan Nath v. Tirbeni Sahai**, A. W. N. (1908) 274.

BANERJI, J.

Reference:—A.W.N. (1900) 11, D.

(2) S. 241—See No. 1, *supra*.

Act XII of 1881 (N.W.P. Rent)

(1) S. 9—Death of occupancy tenant—Devolution of tenancy—Mohomedan Law of Succession inapplicable—See Act II of 1901 (N.W.P. Acts), No. 4, 5 A. L. J. 77.

(2) S. 174—Lease by Collector—Proceedings commenced before the passing of Act II of 1901—Termination of.

In executing a decree of a Rent Court, the Collector, purporting to act under S. 174 of the N.W.P. Rent Act, made a lease of the property of the judgment-debtor, after the passing of the Tenancy Act II of 1901. In a suit brought to set aside the lease, *held* that the execution proceedings having commenced before the passing of the new Act, should have been completed under that Act and the Collector could grant a lease of the property instead of selling it. **Ghulam Abbas v. Abdulla Khan** 5 A. L. J. 472 A. W. N. (1908), 219.

STANLEY, C.J. and BANERJI, J.

Act XVI of 1882 (Jhansi Encumbered Estates)

(1) S. 8 cl. c (1)—Mortgage by a disqualified proprietor—Suit after the cessation of disqualification—Not maintainable—Consideration—Void—Contract Act (IX of 1872)—Limitation Act (XXV of 1877), Sch. II, Art. 75—Money decree

A disqualified proprietor, under the Jhansi Encumbered Estates Act, mortgaged his property during the time when his disqualification had not ceased. After the disqualification had ceased the mortgagee brought a suit for foreclosure. *Held*, such a mortgage being forbidden, by the provisions of the law, the consideration was also forbidden and it was void under S. 23 of the Indian Contract Act, and the provisions of S. 43 cannot be applied to such a case.

The claim having been brought more than six years after the whole money became due, a decree for money could not be given as it was barred by Art. 75, Sch. II, Limitation Act. **Radha Bai v. Kamod Singh**, 4 A. L. J. 696—A. W. N. (1907), 276—30 A. 38

BANERJI and AKMAN, JJ.

7.—North West Provinces Acts—(Contd.).**Act IX of 1889 (N. W. P. and Oudh Kanungos and Patwaris).**

Ss. 9, 13 and 16—Suit for recovery of *putwari*, rate from under-*putwari*—Jurisdiction of Rent Courts. See Act XXII of 1886 (Oudh Rent), No. 3, 11 O.C. 326.

* (2) S. 13—See No. 1, *supra*.

(3) S. 16—See No. 1, *supra*.

Act I of 1900 (N. W. P. and Oudh Municipalities).

(1) S. 17—Suit against Municipal Board—*Misdescription of defendant*.

Where a suit is instituted against a Municipal Board, it must be brought in the corporate name of the Board and not in the name of the Chairman. **Santan v. The Chairman, Municipal Board, Allahabad.** A. W. N. (1908), 165.

BANERJI, J.

Reference.—2 A. 296 and 16 M. 296, *It*.

(2) S. 88 (1)—*Public street, meaning of—blind lane*.

Where it was proved that a *cul de sac* had been lighted, drained and swept by the Municipality, and upon sale of the property of the former owner, the portion forming this lane had not been sold, and the public had been using it freely for thirty years, *held*, that it was public street within the meaning of S. 88, Sub-section 1 of the North Western Provinces and Oudh Municipalities Act. Where, therefore, the Municipality ordered the demolition of constructions made upon it, and an injunction was asked for against interference with the lane *held*, that the Municipality acted within its rights and the injunction should not be granted. **The Municipal Board of Bulandsahar v. Dakhani Lal**, 5 A. L. J. 15—A. W. N. (1908), 15—30 A. 70.

KNOX and AIKMAN, JJ.

Act II of 1901 (Tenancy).

(1) Effect of provisions of Act on proceedings in execution of Rent Court decree—S. 174, N. W. P. Rent Act. See Act XII of 1881 (Rent), No. 2, 5 A. L. J. 472.

Ss. 4 (5) & 32 (2) Chapter III—*Partition of rent-free holding—Suit maintainable*.

S. 32 (2) does not apply to a rent-free grantee but falls within Chapter III which deals with division devolution and transfer of tenancies. A tenant does not include a rent-free grantee. A suit for partition of a rent-free holding is maintainable in the Civil Court.

7.—North West Provinces Acts—(Contd.).**Act II of 1901 (Tenancy)—(Concluded).**

Sagar Mal v. Makhan Lal, 5 A. L. J. 784.

STANLEY, C. J. and BANERJI, J.

References.—A. W. N. (1908), 197, *App*.

(3) S. 22—*Occupancy holding—Succession—“Male lineal descendant”—Illegitimate son—Hindu law*.

Held that the illegitimate son of a man belonging to one of the Sudra castes by a kept woman, or continuous concubine, was capable of succeeding to the occupancy holding of his father as a “male lineal descendant” within the meaning of S. 22 of the Agra Tenancy Act 1901. **Ram Kali, v. Jamuna**, A. W. N. (1908), 229—5 A. L. J. 629.

STANLEY, C. J. and BANERJI, J.

References.—13 M. L. A. 141, 8 A. 134 and 6 A. 329, *R*.

(1) S. 22 (1)—*Male lineal descendants—Mohamedan law of succession not applicable*.

The new Tenancy Act has completely altered the rule of devolution in the case of an occupancy tenancy upon the death of the tenant. The tenancy no longer devolves “as if it were land” (as in Act XII of 1881) but on the lineal male descendants of the last tenant. The Mahomedan Law of Succession does not apply.

Hence, where a Mahomedan occupancy tenant died leaving a son and grandson, *held* that they would share the occupancy holding equally, **Bhura v. Shab-ud-din**, 5 A. L. J. 27—A. W. N. (1908), 37—30 A. 128.

STANLEY, J. and BURKITT, J.

(5) Ss. 22 & 32—*Occupancy and rights acquired by widow before the passing of Act—Devolution on brother—Jurisdiction—Civil and Revenue Courts*.

Defendant's Appeal.

Y & M, two Mahomedan brothers, jointly held an occupancy holding. M died before the passing of the new Tenancy Act leaving a widow. His share in the holding was recorded in the widow's name. The widow of M died leaving a brother. The Revenue Court entered the name of Y's son in place of M's widow. The widow's brother brought this suit for joint possession. *Held*, that the suit was not obnoxious to the bar of section 32 (2), Tenancy Act, as it was not a suit for actual division of the occupancy holding. *Held* further, that M

7.—North West Provinces Acts—(Contd.).**Act II of 1901 (Tenancy)—(Continued).**

having died before the passing of the Tenancy Act, his widow inherited his property absolutely and had absolute right to be considered an occupancy tenant and that after her death, which took place after the passing of the Act, her brother was entitled to succeed as provided in S. 22 (c) **Ayub Ali Khan v. Mashuq Ali Khan**, 5 A.L.J. 738.

AIKMAN AND KARAMAT HUSAIN JJ.

Reference.—Sel. Dec. Board of Revenue No. 2 of 1905 approved

- (6) S. 32—*Suit for exclusive possession of an occupancy holding*—*1 P. Land Revenue Act (III of 1901, Local) S. 14—Revenue Court, refusing to correct an entry—Jurisdiction of Civil Court.*

Where a suit is brought by the plaintiff for exclusive possession of an occupancy holding on the ground that the defendant is a trespasser, it cannot be regarded as a suit for division of an agricultural holding and S. 32 of the Agra Tenancy Act does not bar it (a)

The decision of the Revenue Court refusing to correct an entry in the revenue register as to the name of a tenant cannot preclude the plaintiff from maintaining a suit in the Civil Court. S. 44 of the Agra and Oudh Land Revenue Act refers to registers A—D and not to register E. **Ajodhya Singh v. Ram Dayal Upadhyia**, 4 A. L. J. 769 = A. W. N. (1908), 3.

BANERJI, J.

Reference.—26 A. W. N. 271, D.

- (7) S. 32—*Division of tenancy—Abatement—Death of pro forma defendant.*

Plaintiffs claimed a half share in an occupancy holding and prayed for possession of that share or such other relief as the Court might think fit to grant. The Court below passed a decree for possession of the share claimed.

Held that this was substantially a decree for division of the holding and was opposed to S. 32 of the Tenancy Act. The plaintiffs were, however, entitled to a declaration of right to one half of the holding.

The death of a *pro forma* defendant, who had appealed along with the other defendants who could have maintained their appeal independently of the said *pro forma* defendant, does not serve to abate the appeal of other defendants. **Ashiq Hussain v. Asghari Begam**, 4 A. L. J. 809 = A. W. N. (1908), 21 = 30 A. 90.

BANERJI AND AIKMAN, JJ.

7.—North West Provinces Acts—(Contd.).**Act II of 1901 (Tenancy)—(Continued).**

- (8) S. 32—*Act (Local) No. III of 1901 (United Provinces Land Revenue Act), S. 233—Civil and Revenue Courts—Jurisdiction—Suit for partition of a rent-free plot.*

Held that a suit for partition of certain isolated plots of land alleged to be held rent-free is not excluded from the jurisdiction of a Civil Court either by S. 233 of the United Provinces Land Revenue Act, 1901, or by S. 32 of the Agra Tenancy Act, 1901 **Abdul Karim v. Ramzan**, A. W. N. (1908), 197

RICHARDS J

Reference.—6 A. 452 R.

- (8 a) S. 32—See No. 5, *supra*.

- (8-b) S. 32 (2)—See No. 2, *supra*

- (9) S. 95, cl. (b)—*Declaration that plaintiff as the adopted son of a tenant was entitled to his tenancy—Declaration of tenancy—Jurisdiction—Civil Court.*

One D applied to the revenue authorities that his adoptive father, I, was joint in cultivation with him and that his name should be recorded in respect of I's occupancy holding. The Collector dismissed the application on the ground that D was not the adopted son of I. D brought this suit in the Civil Court for a declaration that he was joint in cultivation with D and that he was the adopted son of Ishri and that on account of the right of survivorship and his being joint in cultivation he was entitled to the possession of the estate of Ishri and of the occupancy holding." *Held*, that the nature of the suit was that the plaintiff wanted a declaration as to the class of tenancy to which he belonged and its cognisance by the Civil Court was barred by cl. (b) of S. 95 of the Agra Tenancy Act. **Dori Lal v. Sardar Singh**, 5 A. L. J. 514 = A. W. N. (1908), 240.

KNOX and RICHARDS, JJ.

- (10) S. 159—"Other dues" in the Section includes *lambardari* dues—See Act III of 1901 (LAND REVENUE), No. 8, 4 A. L. J. 781.

- (11) S. 162—*Suit to recover arrears of malikana allowance—Civil and Revenue Courts—Jurisdiction—Act XV of 1877 (Indian Limitation Act), Sch. II, Art. 132—Limitation.*

Held that a suit for the recovery of arrears of malikana allowance will lie in a Civil Court and is governed as to limitation by Art. 132

7.—North West Provinces Acts—(Contd.).**Act II of 1901 (Tenancy)—(Continued).**

of the second Schedule to the Indian Limitation Act, 1877. **Manohar Lal v. Kashi Ram**, A. W. N. (1908), 209

BANERJI, J. *

Reference—N. W. P. H. C. Rep. 1870, p. 228, D.

(12) Ss. 164 & 165—Suit for profits—Mode of collection—See *RES JUDICATA*, No. 2, 5 A. L. J. 117.

(12-a) S. 165—See No. 12, *supra* and No. 20, *infra*.

(13) S. 177—Which party a tenant—question of proprietary title.

The question, which of the two parties is a tenant of specified land, is not a question of proprietary title (a) **Niranjan v. Gajadhar**, 5 A. L. J. 71 A. W. N. (1906), 45-30 A. 131

KNOX and ATKMAN, JJ

Reference—(a) A. W. N. (1906), 247, overruled

(14) S. 177, Sch. IV, (Group 1)—Second appeal to District Judge—Proprietary title, question of.

When a person, against whom a suit for arrears of rent is brought, only pleads that the relation of landlord and tenant does not subsist between him and the plaintiff, and the Assistant Collector and the Collector decide against him, no second appeal lies to the District Judge, inasmuch as no question of proprietary title is involved in the case **Ahmadullah Khan v. Murli**, 5 A. L. J. 128—A. W. N. (1908), 69.

KARAMAT HUSAIN, J.

References—A. W. N. (1905), 46, A. W. N. (1906) 247, D.

(15) Ss 177 and 199—(Question of proprietary title—Decision by Assistant Collector—Appeal—See JURISDICTION (CIVIL AND REVENUE COURTS), No. 7, 4 A. L. J. 686—30 A. 25.

(16) S. 199—Suit filed beyond the period prescribed by, but within time under, Limitation Act—Whether time barred.

When an order under S. 199 of the Agra Tenancy Act is passed by a Revenue Court, directing the defendant to file a suit in Civil Court within the time limited by that section, the ordinary period of limitation is thereupon suspended and the special period provided by the Tenancy Act is substituted. Such suit instituted beyond the period prescribed by the

7.—North West Provinces Acts—(Contd.).**Act II of 1901 Tenancy—(Continued).**

Tenancy Act is barred by limitation irrespective of the period prescribed by Sch. II of the Limitation Act. **Banwari Lal v. Gopi**, 4 A. L. J. 713—A. W. N. (1907), 282—30 A. 44.

DILLON, J.

(16-a) S. 199—See No. 15, *supra*.

(17) S. 201—Act I of 1872 (Indian Evidence Act), S. 4—Evidence—Presumption—Record of plaintiff's name as a co-sharer.

Held that the presumption enjoined by Section 201, clause, (3) of the Agra Tenancy Act, 1901, is not conclusive, but may be rebutted by evidence offered to the contrary. **Dhanka v. Umrao Singh**, A. W. N. 1907, 292—4 A. L. J. 30 A. 58.

STANLEY, C. J. and BURKITT, J

Reference—29 A. 158, D

(18) S. 201—Act I of 1872 (Indian Evidence Act), S. 4—Evidence—Presumption—Record of plaintiff's name as a co-sharer.

Held, on a construction of section 201 of the Agra Tenancy Act, 1901, that the words "If in any suit instituted under the provisions of Chapter XI **** the plaintiff is recorded as having such proprietary right, the Court shall presume that, he has it" mean that, so far as the Revenue Court is concerned, such Court is bound to presume, in favour of the plaintiff, and it is for the defendant "to establish by suit in the Civil Court that the plaintiff has no such proprietary right." **Bechan Singh v. Karan Singh**, A. W. N. (1908), 186—5 A. L. J. 495—4 A. 447.

BANERJI and RICHARDS, JJ.

References—30 A. 58, 29 A. 148, Diss.; A. W. N. (1907) p. 43, F. 29 A. 158 Explained.

(19) S. 201, Sub-Sec. (3)—Person recorded as having proprietary rights—Presumption.

In a suit for profits by a person who was recorded as having the proprietary right entitling him to claim profits, it was held that, under Sub-sec. (3) of S. 201 of the Act, the Court should presume that such person had a proprietary right, and that the defendant was competent to sue in a Civil Court under the proviso to that sub-sec. to establish that the plaintiff had not the proprietary right claimed by him. **Niaz Ali Khan v. Govind Ram**, A. W. N. (1908), 187 (note).

BANERJI and RICHARDS, JJ.

7.—North West Provinces Acts—(Continued.)

Act II of 1901 (Tenancy)—(Concluded).

(20) *Ss. 201, Sub-sec. (3) & 165—Person recorded as having proprietary rights—Presumption.*

An entry in a khewat according to the provisions of S. 201, Sub-Sec. (3) of the Act is conclusive, and the Courts have no power in a suit under S. 165 of the Act, to go behind the entry in the khewat. **Har Prasad v. Syed Muhammad Baqar**, A.W.N. (1908), 187 (note) = 30 A 451.

KARAMAT HUSAIN, J.

Act III of 1901 (N. W. P. and Oudh Land Revenue).

(1) *Purchaser's liability for arrears of Government Revenue—Liability as between purchaser and original co sharers—Contribution between persons equally liable for payment—Land Revenue Act (III of 1901), S. 142—Contract Act, S. 69*

Held, that the object of the second part of the first clause of S. 142 of Act III of 1901 is not to transfer the liability for the revenue from one person to another, but to make the person succeeding to the property liable in addition to those already liable

Held further, that, as between a vendee and the vendor, in the absence of a contract to the contrary, the responsibility for payment of the arrears of revenue, rests on the latter who enjoyed the property during the time for which the arrears were payable.

Held also, that S. 69 of the Contract Act applies to cases in which both plaintiff and defendant were liable for a payment which has been made by the plaintiff alone (a). **Jagole v. Razawand Singh**, 11 O C. 279 (B)

CHAMBER, J.C. and EVANS, A J C.

References —(a) 1. C.W.N. 458, 32 C. 643, 6 C. W. N. 794, D; A. W. N. (1901), 37, F.

(2) *S. 36—Application for fixing the rent—Certain bond held as obtained by undue influence—Subsequent suit—Whether finding res judicata.*

The Zemindar obtained a bond from a tenant in payment of rent at a certain rate for non-occupancy and ex-proprietary holdings. The tenant applied to the Revenue Court, under S. 36 of the Land Revenue Act, to fix the rent of the holdings. The Assistant Collector held that the bond was obtained by undue influence so far as it related to the ex-propriet-

7.—North West Provinces Acts—(Contd.)

Act III of 1901 N. W. P. and Oudh Land Revenue.—(Continued).

ary holding and fix the rent of the holding. In a suit brought by the Zemindar for arrears of rent, *held*, that the finding of the Assistant Collector about the bond having been obtained by undue influence did not operate as *res judicata*, inasmuch as it was not open to him in an application under S. 36, Land Revenue Act, to decide that the agreement was void so as to preclude the plaintiff from setting it up in a suit. **Shohrat Singh v. Sonkala Kuar**, 5. A L.J. 642 = A. W. N. (1908), 250.

STANLEY, C J, AND KARAMAT HUSAIN, J.

(3) *S. 44—Applicability—See Act II of 1901 (TENANCY, AGRA), No. 6, 4 A L J. 769.*

(4) *Ss. 76 and 77—Superior proprietor—Contract for revenue with inferior proprietors—Effect of—Enhancement of revenue.*

A contract was entered into between a superior and an inferior proprietor that the revenue to be paid for certain land by the inferior proprietor would be Rs. 48. The revenue of that land was, at the time of subsequent settlements enhanced. *Held* that the inferior proprietor was not liable to enhanced revenue, so long as the superior proprietor did not take steps and get the contract rescinded, and until by an order under S. 76 or S. 78 a sub-settlement was made with the inferior proprietor. **Naubat Singh v. Narain Singh**, 4 A L J. 807 = A.W.N. (1908), 27.

BANERJI, J.

(4-a) *S. 77—See No. 4, supra.*

(4-b) *S. 84 (b)—See No. 8, infra.*

(5) *S. 111—Objection by Talukdar in a partition proceeding between under-proprietors, whether could be entertained under the section—See JURISDICTION (OF REVENUE COURTS), No. 1, 11 O C. 252.*

(6) *S. 111, cl. (b)—Suit to establish right to share claimed in a partition case in a Revenue Court, after expiry of period fixed by Revenue Court to establish such right.—*

In the partition proceedings pending between two parties in the Revenue Court, the plaintiff laid claim to the share recorded in the name of the defendant in the revenue papers. By an order dated 2nd June 1905, the plaintiffs were directed under the provisions of S. 111 (b) of the Land Revenue Act (III of 1901) to file a suit within three months to establish their title to the share they claimed. They filed their suit on 12th April 1906.

7.—North West Provinces Acts—(Contd.).**Act III of 1901 (N. W. P. and Oudh Land Revenue)—(Continued).**

Held, that the suit, having been instituted after the expiry of the period of three months from the order of the Revenue Court, could not be entertained (a). **Narendra Bahadur Singh v. Moti Lal Singh**, 11 O. C. 114.

CHAMIER, J. C. and GRIFFIN, A. J. C.

Reference:—(a) 23 A. 291 and 28 A. 432, *R*

(7) Ss. 111 and 233 (h)—Case to which S. 233 (h), Land Revenue Act, does not apply—Decision of Civil Court referred to in S. 233 (h) means “final decision” of that Court—Suit for declaration of title—Application for partition in Revenue Court—Objection. See SPECIFIC RELIEF ACT, No. 7, 5 A. L. J. 614.

(8) S. 144 and 81 (b)—Suit by co-sharers against lambardar—Lambardar entitled to 5 per cent. on the revenue—*Agia Tenancy Act (II of 1901)*, S. 159—“Other dues”—*Set off*.

In a suit for profits by co-sharers against a lambardar, the latter shall be remunerated by fees not exceeding 5 per cent. on the Government revenue, and he is also entitled to the village expenses incurred by him.

The expression “other dues” in S. 159 of the Tenancy Act includes lambardar dues. **Pokhar Singh v. Gulab Kunwar**, 4 A. L. J. 781—A. W. N. (1908), 2.

GRIFFIN, J.

(9) S. 233—Revenue Court, partition effected by, right to challenge by a person having no opportunity to raise objections—Civil Court, jurisdiction of, to consider those objections.

An exchange, after partition, of the parts of a property liable to pre-emption, effected during the pendency of a suit for pre-emption is not binding on the pre-emptors for that reason.

S. 233 of the N.W.P. and Oudh Land Revenue Act, 1901, which provides in effect that the Civil Courts shall not interfere with the partition and union of *mahals* does not apply to a suit with regard to a partition in which the plaintiff had no opportunity of having his objections considered by the Revenue Court. **Bhabhuti v. Gulab**, 10 O.C. 363.

CHAMIER, J. C.

(10) S. 233—Act II of 1901 (Tenancy, Agra), S. 32—Civil and Revenue Courts—Jurisdiction—Suit for partition of rent free plot. See ACT

7.—North West Provinces Acts—(Concl.).**Act III of 1901 (N. W. P. and Oudh Land Revenue)—(Concluded).**

II OF 1901 (TENANCY, AGRA), No. 8, A.W.N. (1908), 137.

(11) S. 233 (h)—N.W.P. Land Revenue Act, 1873, Ss. 132, and 241—Partition—Civil and Revenue Courts—Jurisdiction—See ACT XIX OF 1873 (LAND REVENUE, N.W.P.), No. 1, A.W.N. (1908), 274.

(12) S. 233 (h)—See No. 7, *supra*.

Act I of 1903 (Bundelkhand Encumbered Estates)

(1) Ss. 2 and 12—Joint decree—Execution of decree—Effect of some out of several joint judgment debtors taking advantage of the Act.

Five out of six joint judgment-debtors took the benefit of the Bundelkhand Encumbered Estates Act, 1903. A notification was issued under the Act, but the decree-holders did not make any claim within the time prescribed. *Held* that the decree-holders could not recover from the judgment-debtor who had not taken advantage of the Act anything more than his proportionate share of the judgment-debt. **Makund Rao v. Janki Bai**, A.W.N. (1908), 43 = 5 A.L.J. 132—30 A. 441.

AIKMAN and KARAMAT HUSAIN, JJ.

(2) S. 12—See No. 1, *supra*.

8.—Oudh Acts**Act XVIII of 1876 (Oudh Laws).**

(1) Chap. II—Whether right of pre-emption is confined to out and out sale, and mortgages by way of conditional sale—See PRE-EMPTION, No. 15, 10 O. C. 374.

(2) S. 9—No suit for pre-emption in case of perpetual lease—Lease not a sale—See PRE-EMPTION, No. 8, 10 O. C. 348.

Act XXII of 1886 (Rent).

(1) “*Special contract*,” meaning of—Tenant of lands in a joint *mahal* taking a mortgage with possession of a share therein, liability of, to pay rent as tenant to the lambardar.

The plaintiff was owner of a 2 annas 8 pies share in a *mahal*. He was also lambardar to the entire *mahal*. His brother R. had a 2 annas 8 pies share and the remaining 10 annas 8 pies share in the *mahal* belonged to other persons, who mortgaged it with possession to the

8—Oudh Acts—(Continued).**Act XXII of (Rent)—(Continued).**

plaintiff. The defendant, who was a tenant of 15 plots in the *mahal*, took a mortgage with possession of R's share. This was a suit for recovery of the plaintiff's share of the rent.

Upon the defence that by an arrangement between the plaintiff and R the latter had received the rent of the plots in question and therefore the plaintiff was not entitled to sue for it, *held*, that there being nothing to show that this was intended to be a permanent arrangement or that the arrangement was intended to continue even if R parted with his share, it did not evidence a "special contract" within the meaning of S. 126 of the Oudh Rent Act.

Held, further, that the defendant did not cease to be a tenant of the plots in question and liable for the rent thereof to the *lambardar* by taking a possessory mortgage of the share of R. (a) **Jokhu Singh v. Ram Autar Singh**, 11 O. C. 75.

CHAMBER, J. C.

References.—(a) 21 A 187, A.W.N. 1901, p. 53, and 28 A. 763, J', R A R No. 67 and 1 O C. 152, *referred to*.

(1-a) S. 3—*Marwat grant*, not an under-proprietory right—See *MARWAT GRANT*, No. 1, 11 O C. 240

(2) S. 107. II—*Declaration of under-proprietory rights and assessment of rent, effect of from date of order.*

Held, that a person declared to be an under-proprietor under S. 107 H, Oudh Rent Act, becomes an under-proprietor from the time when the declaration is made and not before.

Held, further, that the rent assessed under this section becomes payable only from the date of declaration made in the suit (a) **Par-tab Bahadur Singh v. Bajrang Ball Singh**, 11 O. C. 187.

CHAMBER, J. C.

References :—(a) 8 A 189, 9 O C. 22, 7 D.

(3) S. 108 (2)—*Patwari rate, suit for recovery of—Jurisdiction—Rent Courts—N W. Provinces and Oudh, Kanungos and Patwaris Act (IX of 1869), Ss. 9, 13 and 16.*

A suit for recovery by a superior-proprietor of the Patwari rate, due from an under-proprietor with whom a sub-settlement of the whole illage has been made, lies in the Rent Courts,

8—Oudh Acts—(Concluded).**Act XXII of (Rent)—(Concluded).**

under S. 108, cl. (2) of the Oudh Rent Act. **Har Charan Das v. Prithiraj Singh**, 11 O. C. 326.

CHAMBER, J. C.

Reference—R. A. R No. 73, *overruled*.

(4) Ss. 129 and 132—*Arrears of profits, suit for, when cause of action arose during minority of the plaintiff—Limitation (Act XV of 1877), S. 7.*

In a suit for arrears of profits, when the cause of action arose during the minority of the appellant, it was *held* that, under S. 129 of the Oudh Rent Act, the appellant was entitled to the benefit of S. 7 of the Indian Limitation Act **Gur Pershad v. Gokaran Nath**, 11 O. C. 118.

CHAMBER, J. C., and EVANS, A.J.C.

(4 a) S. 132—See No. 4, *supra*.

Act IV of 1901 (Oudh Civil Courts).

S. 17—*Suit for possession of land by demolition of buildings thereon or on payment of compensation for it—Buildings worth more than Rs. 1000—Whether buildings part of subject-matter of suit within the meaning of section.* See *VALUATION OF SUIT*, No. 2, 11 O. C. 45.

9.—Punjab Acts.**Act IV of 1872 (Punjab Laws).**

(1) *Vendee having a superior right of pre-emption under the Punjab Laws Act to pre-emptor—whether saving clause of S. 2 (3) of Act II of 1905 protects him against pre-emptor having superior rights under Act II of 1905—Priorities under Act II of 1905 and this Act—See PRE-EMPTION*, No. 12, 18 P.W.R. 1908.

(2) Ss. 12 and 15—*Pre-emption—Compound interest on money awarded to vendee—Plaintiff claiming for benefit of another—Burden of proof—"Land"—Vendee—Owning small bit of cultivable land used as building site.*

Held, that the defendant, on whom the onus lay, had failed to show that the plaintiff did not file the suit for pre-emption for his own benefit, but for the pleader engaged in the case, who, it was shown, was a personal friend of the plaintiff and had apparently taken extreme personal interest in the matter of the claim.

9.—Punjab Acts—(Continued.)**Act IV of 1872 (Punjab Laws)—(Concluded.)**

Held, also, that a small bit of land, at one time agricultural and assessed with revenue of 9 pies, purchased by the vendees after it had been built over could not be considered as "land" conferring the right of pre-emption on the vendees (a).

Held, also, that under S. 15 of the Punjab Laws Act, compound interest may be allowed to the vendee. **Sham Sundar v. Sodhi Harbans Singh**, 109 P.L.R. 1903 = 78 P. W. R. 1908.

JOHNSTONE and SHAH DIN, JJ.

References.—(a) 7 P.R. 1896, 153 P.R. 1888, 96 P.R. 1898, R.

(2-a) S. 15—See No. 2, *supra*.

(3) S. 16 (a)—Demand of security—Value of property as it stood at time of sale can only be looked to—Not value of improvement made by vendee after purchase—See LIMITATION, No. 1, 66 P. W. R. 1908.

(4) Insolvent's Estate's Court constituted under Act—Jurisdiction to entertain application under S. 314 C. P. C. See CIV. PRO. CODE, No. 222-a, 161 P. W. R. 1908.

Act XVIII of 1884, (Punjab Courts).

(1) S. 3—*Appeal—Land suit—Suit for declaration that the plaintiff is the sole owner of an orchard on a partition of the village shamlat—Act. XVII of 1887, Ss. 116 & 158—Question relating to enforcement of entry in wajibul-arz—Question of title or mode of making the partition.*

A suit for a declaration that a certain orchard on a portion of the village *shamlat* is planted by the plaintiff alone at his own expense, and that he is in sole possession thereof, without making any claim regarding the land occupied by the orchard, or the *shamlat* as a whole, is not a *land suit* within the meaning of S. 3 of the Punjab Courts Act, 1884 and hence no appeal lies as of right.

On the partition of a joint holding, the question whether the garden having been planted on a part of the common land by the plaintiff by his own individual labour, and at his own cost, should, or should not according to the rule laid down in the village administration paper, be allotted to the plaintiff at partition, is a question relating to the mode of making the partition within the purview of cl. (b), S. 116 of the Punjab Land Revenue Act of 1887,

9.—Punjab Acts—(Continued.)**Act XVIII of 1884 (Punjab Courts).—(Contd.).**

and should be decided by the Revenue officer under S. 118 of the Act. It is not one relating to the title of the property, and, as such) excluded from the cognizance of the Civil Courts under cl. (1) of S. 158. **Devi Dial v. Ahmad Khan**, 4 P. R. 1908 = 14 P. W. R. 1908 = 91 P. L. R. 1908.

RATTIGAN and SHAH DIN, JJ.

(2) Ss. 3, 70—Punjab Tenancy Act XVI of 1887, S. 4—Land suit—Admissibility in evidence is question of law within S. 70 (b) of Punjab Courts Act—See EVIDENCE ACT, No. 24, 129 P. W. R. 1908.

(3) S. 40 (b)—*Suit by reversioner for a declaration that a mortgage by widow will not affect his interest—Thirty times jama rule—Value of the property for purposes of appeal.*

A suit for a declaration that a certain mortgage-deed, in which the consideration was stated at Rs. 300, but the land mortgaged by it is worth only Rs. 60-3-6 according to the thirty times *jama* rule, shall not affect the reversionary rights of the plaintiff, is in effect a suit for a declaration that the plaintiff is reversioner to land, worth Rs. 60-3-6 according to the said rule, regardless of any incumbrances created by the widow (a). The value of the suit is the value of the land calculated at 30 times the *jumma*, and not the amount of the incumbrances.

By the decree in such a suit, the plaintiff will get the land on the death of the widow, without reference to the mortgage or its precise amount. No appeal from the order of the lower appellate Court lies under S. 40 (b) of the Act, as the value of the suit and the property involved must be taken as less than Rs. 250 (b). **Harl Singh v. Nika Singh**, 42 P. R. 1907 = 100 P. W. R. 1907 = 66 P. L. R. 1908.

JOHNSTONE, J.

References (a) 145 P. R. 1892, F; (b) 145 P. R. 1892, F, 24 P. R. 1903 (F.B.), D.

(3-a) S. 40 (1) as amended by Act XXV of 1899—*Further appeal—Valuation—Mortgage—Redemption suit—Cost of repairs—Additional lien.*

In a suit for redemption on payment of Rs. 323 the Court of first instance found Rs. 1,168 due and made redemption conditional.

9.—Punjab Acts—(Continued).**Act XXVII of 1885 (Punjab Courts)—(Contd.).**

on payment of that sum. The Lower Appellate Court reduced the amount to Rs. 604.

Held, that the value of the property involved in the decree was over Rs. 1,000.

Held, further, that the amount decreed for repairs was as much part of the money payable before redemption as was the actual mortgage consideration due and was therefore involved in the decree.

Held, also, that a document, which merely provides that the amount advanced under it must be repaid when the mortgage is redeemed, and which does not make payment a condition precedent to redemption, does not create an additional lien on the property. **Kishen Chand v. Taj Din**, 197 P. L. R. 1908

SIR WILLIAM CLARK, C.J., & REID, J.

(3-b) S. 10 (1), as amended by Act XXV of 1899—Further appeal—Valuation—suit for possession—Defendant setting up mortgage.

Held, that, in a suit for possession of land, the value of the suit must be taken on the case brought by the plaintiff irrespective of the pleas raised by defendant. **Budh Singh v. Dewa Singh**, 199 P. L. R. 1908.

SIR WILLIAM CLARK, C. J., & REID, J.

(1) S. 70—Concurrent findings by both the lower Courts on a question of fact—Chief Court's power of revision—See LIMITATION ACT, No 36, 37 P. W. R. 1908.

(3) S. 70, as amended by Act XXV of 1899—Revision—See CIV. PRO. CODE, No. 76, 15 P. W. R. 1908.

(5-a) S. 70—See No. 2, *supra*.

(6) S. 70 (a)—Onus Probandi—Fraud—Material irregularity.

Held, that fraud, when pleaded, must be clearly proved and cannot be assumed.

Held, also, that a Court commits a material irregularity, within the meaning of S. 70 (a) of Act XVIII of 1884, if it.—

(a) rejects *prima facie* reliable evidence, whether oral or documentary; (b) accepts an apparently false and absurd plea of a defendant who is bound to prove it by some satisfactory proof, or, (c) wrongly places the *onus probandi* of an issue on a party. **Jiwan Ma v. Hari Ram**, 143 P. W. R. 1908.

RATTIGAN, J.

9.—Punjab Acts—(Continued).**Act XXVIII of 1885 (Punjab Courts)—(Contd.).**

(6-a) S. 70 (a)—Power of Chief Court in revision acting under, to quash proceedings of Court of first instance, where such Court is found to have no jurisdiction. See CIV. PRO. CODE, No. 222 a, 161 P. W. R. 1908.

(7) S. 70, Cls (a) and (b)—Order rejecting plaint on the ground of misjoinder of parties or causes of action—Liability to revision. See CIV. PRO CODE, No. 46, 9 P. W. R. 1908.

(8) S. 70 (b)—Depositing appeal memo in the box put up for that purpose—Proper presentation—Sufficient cause under S. 5, Limitation Act—Important question of law,—See LIMITATION, No. 3, 71 P. W. R. 1908

(9) S. 70 (b)—Acquiescence—It is a question of law and a good ground for revision.

Held, that acquiescence is not a question of fact, but of law, and, consequently, it is a good ground for a revision under S. 70 (b) of Act XVIII of 1884, as amended by Act XXV of 1899 (a).

Held, also, that there is nothing whatever in the following facts to indicate that D and other reversioners of R ever acquiesced in the gift of his holding in favour of S and others.

"R transferred the whole of his property to S and others by a deed of gift dated 2nd January, 1886. Mutation was finally sanctioned on the 27th March, 1887. With the exception of 17 kanals which R held in his own name, the rest of the property included in the gift, about 158 ghumaos, was possessed by a prior mortgagee G. Despite the gift, R never parted with the possession of these 17 kanals, and the donees neither before, nor after, the donor's death, ever made an attempt to redeem the prior mortgage. But they took actual possession of the 17 kanals after R's death which took place in 1891. Within one year, however, of R's death his reversioners (D and others) instituted a suit for a declaratory decree in respect of the mortgaged portion, and for possession of the 17 kanals of the land, and on 8th February, 1892, their plaint was rejected on account of their failure to amend it. On the 4th January 1894, they sold the whole of R's estate to B" (b). **Shair Singh v. Sidhu**, 31 P. W. R. 1908 = 100 P. L. R. 1908.

LAL CHAND, J.

References —(a) 26 A. 576 (P.C.) F, (b) 56 P.R. of 1903 & 11 P.R. of 1907, *Referred to*.

9.—Punjab Acts—(Continued).

Act XVIII of 1885 (Punjab Acts)—(Concluded).

(10) S. 70 (1) (a), *Revision—Civil cases—Material irregularity—Ignoring the effect of document—Wrong interpretation of document.*

Held, that though a wrong interpretation of a document does not amount to a material irregularity within the meaning of Section 70 (1) (a) of the Punjab Courts Act, justifying interference in revision by the Chief Court, yet where the Lower Court has completely ignored the terms of a document or has placed on them a perversely erroneous construction, the Chief Court is fully justified in revising the judgment of the Lower Court. **Gulla Singh v. Sunder Singh**, 173 P. L. R. 1908 106 P. R. 1908—151 P. W. R. 1908.

RATTIGAN, J.

(11) S. 70, Ss. (1) (a) and (b)—Suit for possession—Appeal—Power of Chief Court to take up the case under the Act. See **CONTRACT ACT**, No. 4, 51 P. R. 1908.

(11-a) S. 70 (1) (b), Powers of Chief Court under—Revision of order S. 19, Act IX of 1899 See **ACT IX OF 1899 (ARBITRATION)**, No. 1-a, 111 P. R. 1908.

(12) Suit for possession of house—Decree on payment to defendant of value of improvement to the house—Appeal under S. 39 of Punjab Courts Act—Jurisdiction of District Judge to entertain appeal—Value for purposes of Court fee and jurisdiction, whether same or different—See **COURT FEES ACT**, No. 7, 19 P. R. 1908.

Act XVI of 1887 (Tenancy).

(1) S. 4—Punjab Courts Act XVIII of 1881, S. 3—Land suit—Long delay in suing no abandonment in law. See **EVIDENCE ACT**, No. 24, 129 P. W. R. 1908.

(2) S. 4 (1)—Ghar-mumkin land attached to a well, suit for possession of jurisdiction—Chief Court's power to revise findings on facts relating to jurisdiction

Land, which is outside the *abad* and is attached to a well, has *khurli* and is entered as *ghar-mumkin*, and has *bluse* stacked on it, is agricultural land and fulfils the requirements of S. 4 (1) of the Act. A suit for possession of such land is a land suit, and the District Court is not competent to hear the appeal in the case.

In order to decide whether the District Court had jurisdiction, the Chief Court has power to go into all the matters pertaining to the condi-

9.—Punjab Acts—(Continued).

Act XVI of 1887 (Tenancy)—(Continued).

tions of cognizance by the lower Court of the appeal decided by it (a). **Gandu Singh v. Natha Singh**, 12 P. R. 1907 = 6 P. L. R. 1908 = 92 P. W. R. 1907.

CHATTERJI, J.

Reference.—(a) 54 P. R. 1896, *li*.

(3) Ss. 4, cl. (12), 77 (3) (j)—*Hogq-buha—Village cess—Jurisdiction of Civil and Revenue Courts.*

Customary dues of the nature of *Hogq-buha*, levied by the proprietary body of a village from non-proprietary residents, fall within the definition of village cess contained in cl. (12) of S. 4 of the Tenancy Act (a). Suits for the recovery of these dues are therefore cognizable by the Revenue Courts under S. 77 (3) j) of the Act. **Shahya v. Karm Khan**, 95 P. R. 907 (Footnote) p. 453 = 120 P. L. R. 1908 note) = 112 P. W. R. 1907.

ROBERTSON and KENSINGTON, JJ.

(1) S. 5 (1) (b)—Occupancy rights—Rights of tenants who are joint owners of holding as against the heir of *muqaddar* with whom settlement is made. See **MUAFI**, No. 1, 3 P. R. 1908 (Rev.)

(5) Ss. 5, 6 and 59—Takarridar—Succession to his holding by his adopted son—Claim by proprietary body of *Mauzia Talwandi*, *Tehso Dina Nagar*, District *Gurdaspur*—Land entered as *Shimlat Deh*—Charitable gift—*Muafi*—Occupancy tenant—No analogy between *Takarridars* and *Mukarridar* of *Rawalpindi*—See **TAKARRIDAR**, No. 1, 120 P. W. R. 1908.

(5-a) S. 6—See No. *Supra*.

(6) S. 9—Acquisition of occupancy rights by mere lapse of time not allowed. See **OCCUPANCY RIGHTS**, No. 1, 60 P. R. 1908.

(7) Ss. 14, 77 (3) (u) & 99—Claim for damages by an occupancy tenant for being prevented by force from cultivating his holding—Cognizability by Civil Court—See **JURISDICTION (OF CIVIL AND REVENUE COURTS)**, No. 6, 55 P. W. R. 1908.

(8) Ss. 53 and 59—Succession to occupancy tenancy—Adopted son of occupancy tenant associating strangers with him—Right of collateral heirs of the adoptive father to succeed to adopted son dying childless.

While, in cases of contest between a landlord and others regarding succession to, or alienation of, a tenancy, Ss. 58 and 59 of the Act must

9.—*Punjab Acts—(Continued).*

Act XVI of 1887 (Tenancy)—(Continued).

be regarded; on the other hand, in cases of conflict between occupancy tenants and those who would be their natural heirs under custom, or, between persons claiming succession to an occupancy tenancy, the holder of which has died, and alienees of the occupancy rights, the same rule of custom should presumably be followed as regulates alienation of, and succession to, land held in ownership (a).

A, the adopted son and the donee of an occupancy tenant, died sonless leaving a widow, after having formally associated the defendants with him in the tenancy. After the death of the widow a dispute arose between the collateral heirs of the adoptive father of A and the defendants.

Held that, if A was treated as an adopted son, his heirs, under custom and S. 59 (2) of the Act, are his adoptive father's nearest male agnates, and that, if he was treated as a donee, the gift, under custom, reverts, upon failure of his male line, to the heirs of the donor.

Held, also that there was no time bar against the plaintiffs, inasmuch as they could not sue for possession until the death of the widow of A. *Saida v. Ismail*, 76 P.R. 1907—32 P.L.R. 1908.

JOHNSTONE, J.

References—(a) 68 P.R. 1894, 89 P.R. 1898, (F.B.) 69 P.R. 1900, 12 P.R. 1904, and 109 P.R. 1894, *It.*

(9) *Ss. 53 and 60—Occupancy rights, sale of, without landlord's consent—Delay by landlord in bringing suit—Presumption of acquiescence.*

The fact that a landlord makes a delay of 15 months in bringing a suit for cancelling a transfer, made in contravention of the provisions of the Tenancy Act, cannot raise a presumption that the landlord had acquiesced in the transfer (a). *Mohar Singh v. Jhanda*, 3 P.R. 1907 (Rev.) = 4 P.W.R. (1907), (Rev.) = 44 P.L.R. 1908.

WALKER, F. C.

References—(a) 8 P.R. 1904 (Rev.) = 1 P.R. 1893 (Rev.); 2 P.R. 1898 (Rev.), *It.*

(10) S. 59—Meaning of, "occupied." See OCCUPANCY RIGHTS, No. 2, 100 P.R. 1908.

(10-a). S. 59—See Nos. 5 and 8, *supra*.

(10-b) S. 60—See No. 9, *supra*.

9.—*Punjab Acts—(Continued).*

Act XVI of 1887 (Tenancy)—(Continued).

(11) S. 77—Suit for declaration of mokurari rights—The fact that a mckuraridar is a tenant, not sub-proprietor, does not necessarily make S. 77 or the Act applicable to suit—See JURISDICTION (OF CIVIL AND REVENUE COURTS), No. 3, 42 P.R. 1908.

(12) S. 77—*Res judicata*—C.P.C., S. 13—Suit for possession of revenue paying land included by mistake in the Ejectment Decree passed by a Revenue Court—See JURISDICTION (OF CIVIL AND REVENUE COURTS), No. 5, 73 P.W.R. 1908.

(13) S. 77 (3) (c)—Suit by mortgagee to recover possession from mortgagor on failure by the latter to pay stipulated rent—Omission to apply for mutation of names, effect of—See LANDLORD AND TENANT, No. 19 b, 1 P.R. 1908 (Rev.)

(14) S. 77, cl. (3) (j)—*Kudhi Kamini*—Village cess—Suit to recover—Jurisdiction of Civil and Revenue Courts.

Kudhi Kamini is a village cess within the meaning of S. 77 (3) (j) of the Punjab Tenancy Act, and a suit to recover such dues is excluded from the jurisdiction of the Civil Court (a) *Raj Sarup v. Hardawari*, 95 P.R. 1907—120 P.L.R. 1908 = 141 P.W.R. 1907.

ROBERTSON and KENSINGTON JJ.

References—(a) 95 P.R. 1907, 49 P.R. 1891; 11 P.R. 1890 (Rev.), judgment in Civil Procedure Code, No. 11 of 1904, *It.*

(15) S. 77 (3) (j)—Whether applicable to suit for wages of a labourer fixed by record of rights—See JURISDICTION (OF CIVIL AND REVENUE COURTS), No. 2, 41 P.R. 1908.

(15-a) S. 77 (3) (j)—*Kamiana* a village cess—suit to recover *Kamiana* equal to plaintiff's share not collected by defendant—Suit cognizable by Revenue and not by Civil Courts. See JURISDICTION (OF CIVIL AND REVENUE COURTS), No. 11-a, 128 P.R. 1908.

(15-b) S. 77 (3) (j)—See No. 3, *supra*.

(16) S. 77 (3) (n)—Suit on a bond executed for arrears of rent—Jurisdiction of Revenue and Civil Courts.

Where a suit is based on a bond, the consideration for which is arrears of rent, the suit is cognizable by a civil Court, as being a claim based upon a bond, the claim for rent having merged in the right given by the bond, which was

9.—Punjab Acts—(Continued).**Act XVI of 1887 (Tenancy).—(Concluded).**

given in satisfaction of the claim for rent. The case does not fall under S. 77 (3) (u) of the Act, so as to give jurisdiction to a Revenue Court. **Amrit Lal v Bhagwana**, 41 P. R. 1907—80 P.L.R. 1908=103 P.W.R.=1907.

JOHNSTONE AND RATTIGAN, JJ

References—Civil Reference No. 95 of 1905, F; Civil Reference No. 55 of 1897, Diss.

(16-a) S. 77 (3) (U)—See No. 7, *supra*.

(16-b) S. 99—See No. 7, *supra*.

(17) *Ss. 111 and 112, Scope of,—Right of person to settle, by written agreement, a course of succession different from that prescribed by the Act—(Occupancy rights—Succession.*

Ss. 111 and 112 of the Punjab Tenancy Act are an amendment of S. 2 of the Tenancy Act of 1868. S. 2 of the old Act saved all written agreements between landlord and tenants and gave the force of agreements to all entries in the Settlement Records made and sanctioned prior to the year 1871, as regards questions of rent, ejectment, alienation, succession and compensation. The intention of the Act of 1887 was to curtail the right of persons to contract themselves out of the terms of the Act especially as regards rent, ejectment and compensation, but the validity given by the law of 1868 to entries in Settlement Records prior to 1871 was maintained, and the right of persons in future to contract themselves out of the terms of the Act except as regards matters above-mentioned was declared. Parties can, therefore, by written agreement either prior or subsequent to 1871, settle on a law of succession different from the succession prescribed in the Act. According to S. 112, an entry in a *wajib-ul-az*, prior to 1871, with respect to the succession to land, in which a right of occupancy subsists is an agreement to which the provisions of S. 59 of the Act does not apply (a). **Puran v. Mamun**, 130 P. R. 1907—76 P. L. R. 1908.

CLARK, C. J.

Reference :—(a) 98 P. R. 1894 (F. B.), *It*.

(18) S. 112—See No. 17, *supra*.

(19) Special Tenancies created by Act III of 1893 are governed by rules contained in the Tenancy Act—See ACT III of 1893 (GOVERNMENT TENANTS), No. 1, 14 P.R. 1908.

9.—Punjab Acts—(Continued).**Act XVII of 1887 (Punjab Land Revenue).**

(1) *S. 15—Review—Financial Commissioner's power of reviewing his predecessor's order.*

Held, that, the Financial Commissioner can *suo moto* review his predecessor's order at any time where it is necessary to do so for the sake of justice. **Muhammed Hussain v Akbar Hussain**, 3 P.W.R. 1908 (Rev.).

DOUPE, FINANCIAL COMMISSIONER.

(2) *S. 16 (4)—Order of Deputy Commissioner granting or refusing sanction to permanent alienation of land—Appeal. See PUNJAB ACT XIII of 1900, No. 3, 4 P.R. 1908 (Rev.)*

(3) *S. 28—Zaildars—Rule 166, relating to appointment of Zaildar—Appointment made on appeal by the Commissioner, when to be interfered with by the Financial Commissioner.*

Held, that, the duty of Financial Commissioner in deciding an appeal in a *zaildari* case is that the decision made by the Commissioner should be upheld unless the man he has chosen is either unfit or, for some good reason, ineligible, or is manifestly very inferior to his rival. **Muhammad Murad v Sardar Bakhsh**, 1 P.W.R. 1908 (Rev.).—84 P.L.R. 1908.

DOUPE, FINANCIAL COMMISSIONER.

(4) *Ss. 116 & 158—Suit for declaration that plaintiff is the sole owner of an orchard—Partition of the village shamilat—Question relating to title or "mode of making partition"—See ACT XVIII of 1884 (PUNJAB COURTS), No. 1, 4 P. R. 1908.*

(5) S. 158—See No. 4, *supra*.

Act XX of 1891 (Punjab Municipal Act).

(1) *Ss. 92 and 95—Scope of the sections—Application for construction of building including a projection encroaching upon a street—Implied sanction from silence for six weeks—Applicability of S. 95 to encroachments attached to new buildings.*

If a man applies for sanction, under S. 92 of the Act, for the construction of a new building, which includes a projection, encroaching upon the street, as a part of a larger building, the building of such projection requiring permission in writing under 95 of the Act, he cannot shelter himself under sanction by silence under S. 92, against action under S. 95. The mere fact that sanction for the erection of a projection encroaching upon a street is applied for and included in an application for the construction

9.—Punjab Acts—(Continued).

of a building upon one's own site cannot extend the implied sanction by silence for six weeks under S. 93, to cover acts requiring written sanction under S. 95 (a).

S. 95 of the Act applies not only to encroachments and obstructions which are added to old ones, but also to those which are attached to new buildings.

An encroachment upon a Municipal property, not being street or drain, sewer or aqueduct, would not come within the purview of S. 95 (b). **The Municipal Committee of Delhi v. Devi Mahal**, 62 P.R. 1907 = 105 P.L.R. 1908 = 147 P.W.R. 1907.

ROBERTSON and LAL CHAND, JJ.

References.—(a) 52 P.R. 1900, 27 P.R. 1901 and 27 P.R. 1904, Cr., *It.* (b) 45 P.R. 1905, *It.*

(2) S. 95—See No. 1, *supra*.

Act III of 1893 (Government Tenants).

(1) *Special tenancies created under—Act XVI of 1887—Succession.*

Tenancies created by Act III of 1893 are in matters of succession, governed by the rules contained in the tenancy Act (XVI of 1887)

Where a tenant placed in possession of the land in suit died without heirs limited by S. 59 of the Tenancy Act, the local Government was held to be justified in treating the grant to him as having lapsed. **Sahibzada v Jawaya**, 14 P.R. 1908 = 24 P.W.R. 1908 = 107 P.L.R. 1908.

CLARK, C. J. and REID, J.

Act XIII of 1900 (Punjab Alienation of Land).

(1) *Application of, to suits for lands purchased before the Act.*

Where the right to claim a land in dispute had accrued to the plaintiff before the Land Alienation Act came into force, the subsequent passing of the Act could not deprive him of his vested rights under the sale-deed, which was completed prior to the Act. **Sundar Lal v. Ram Singh**, 10 P.R. 1907 = 5 P.L.R. 1908 = 93 P.W.R. 1907.

LAL CHAND, J.

References.—88 P.R. 1904 = 20 P.R. 1905, *It.*

(2) *Mortgage in favour of agriculturist—Allegation that the mortgage was intended in favour of non-agricultural money-lenders—Validity of mortgage.*

10 c

9.—Punjab Acts—(Continued).

Act XIII of 1900 (Punjab Alienation of Land)—(Continued).

The Civil Courts cannot refuse to enforce a mortgage, perfectly legal on the face of it, executed in favour of an agriculturist, on the mere assumption that the mortgage was intended for the benefit of certain non-agricultural money-lenders, who are prohibited, by the Punjab Land Alienation Act (XIII of 1900), from taking a mortgage and obtaining possession, unless it is in one of the forms specified in the Act. **Jahan Khan v. Dalla Khan**, 142 P.R. 1907 = 86 P.W.R. 1907 = 48 P.L.R. 1908.

ROBERTSON and SHAH DIN, JJ.

(2—*a*) S. 3(3), 5—*Gift by father in favour of daughter—Refusal of sanction by Deputy Commissioner—Revision.*

Held, that a member of an agricultural tribe should not be deprived of the privilege of gifting his land to his daughter, merely because she has married in another district. A sanction granted under S. 3 (3) of Act XIII of 1900, simply means that Government has no objection to the alienation, but, as provided under S. 5 of the Act, it does not touch the questions relating to the reversionary rights in the land.

Query—Whether in such a case sanction of the Collector is at all necessary? (a) **Musamat Sairan v. Ghana**, 8 P.W.R. 1908 (Rev.).

JAMES WILSON, J. C.

Reference.—82 P.R. 1900, *R.*

(3) Ss. 3, cl. (3) and 19—*Order of Deputy Commissioner granting or refusing sanction to permanent alienation of land—Appeal—Revision—Punjab Land Revenue Act S. 16 (4).*

An order by a Deputy Commissioner under S. 3 (3) of the Alienation of Land Act granting or refusing sanction to a permanent alienation of land required by S. 3. (2) is not final, seeing that S. 19 of the Act extends to the proceedings of Revenue officers under the provisions of Chapter II of the Punjab Land Revenue Act. The effect of the section is that such an order is, like other orders of Revenue officers, subject to appeal and revision, as laid down in that Chapter. Such an order may, therefore, be cancelled by the Financial Commissioner in the exercise of his revisional jurisdiction under S. 16 (4) of the Land Revenue Act. **Ram Saran Das v. Sardara**, 4 P.R. 1908 (Rev.) = 7 P.W.R. 1908 (Rev.)

WILSON, F. C.

9.—Punjab Acts—(Continued).**Act XIII of 1900 (Punjab Alienation of Land).—(Concluded).**

(4) *S. 4—Kharals in Hissar District, whether Rajputs and as such agricultural tribe—Onus.*

Where the question was whether Kharals in the Hissar District are Rajputs and entitled for that reason to be considered an agricultural tribe, *held*, (1) that the *onus* was on the defendants (Kharals), who alleged that they were Rajputs, (2) that Kharals were not proved to be Rajputs and as such under S. 4 of Land Alienation Act, an agricultural tribe. **Mansa Ram v. Ghulam Muhammad**, 117 P. R. 1908

CLARK, C. J.

Reference —24 P. R. 1908 R.

(4-a) S. 5—See No. 2-a, *supra*.

(5) S. 19—See No. 3, *supra*.

Act II of 1905 (Punjab Pre-emption).

(1) *Mahtams of Muzaffargarh District, whether members of agricultural tribe.*

Mahtams in the Muzaffargarh District do not belong to an agricultural tribe for the purposes of the Pre-emption Act. **Sonun v. Rupan Bai**, 24 P. R. 1908 = 44 P. W. R. 1908 143 P. L. R. 1908.

CLARK, C. J., and REID, J.

(2) *Scope.*

The act is retrospective. It applies to every claim to right of pre-emption, whether that right accrued before or after its commencement. **Bahadur v. Alla**, 30 P. R. 1907 = 19 P. L. R. 1908 = 145 P. W. R. 1907.

REID, J.

References.—103 P. R. 1901, 90 P. R. 1904, P.

(8) *Application of—Sale completed before Pre-emption Act, in favour of person having preferential rights under Punjab Laws Act, 1872—Correctness of entry in Riwayt nam not supported by instances—Effect.*

Where a sale having been completed before the Pre-emption Act came into force in favour of a vendee with preferential rights under the Punjab Laws Act, 1872, and mutation having taken place in favour of the vendee, the plaintiff respondent, (who having no preferential right under the Punjab Laws Act), related through a common ancestor, and one of the heirs to the property in suits, sued for pre-emption,

9.—Punjab Acts—(Continued).**Act II of 1905 (Punjab Pre-emption)—(Contd.).**

held, that the Pre-emption Act was inapplicable, by reason of the appellant, having as vendee, made payment in respect of the right of pre-emption to which he was entitled at the date of the sale (a).

Where the special custom, in favour of relations descended from the vendor's ancestor and holding land in the village had not been established and the only evidence adduced by the plaintiff respondent was the *Riwayt-nam* of the *tahsil* which recited the custom set up, *held*, that as no instance of this Custom having been enforced or acted on, had been cited, the rule that an entry in a *Riwayt-nam* was proof of the existence of an alleged custom must be modified (b) **Inayat v. Haqnawaz Khan**, 90 P. R. 1908 = 157 P. W. R. 1908

REID, J.

References —(a) 17 P. R. 1908 (F. B.), P; (b) 89 P. R. 1903, 108 P. R. 1900, P, 117 P. R. 1901, 17 P. R. 1908 (F. B.) and 87 P. R. 1906, cited.

(4) *Custom—Punjab Alienation of Land Act (XIII of 1900), S. 2*

In a suit for pre-emption under S. 11 of the Punjab Pre-emption Act against the vendee, instituted on the ground that the plaintiff-claimant for pre-emption was a member of the same agricultural tribe with the vendor, it was *held* that the plaintiff was entitled to the right of pre-emption, in respect of the land in question, although the vendee was an "agriculturist" within the meaning of S. 2 of Act XIII of 1900 (Punjab Alienation of Land Act). **Mahmud v. Nur Ahmad**, 101 P. R. 1907 = 70 P. W. R. 1907 = 174 P. L. R. 1908

(5) S. 2 (3)—*Applicability of Act to a claim to pre-emption created by the provisions of the Act itself.*

According to S. 2 (3) of the Punjab Pre-emption Act, 1905, the Act is intended to apply to every claim to the "right of pre-emption, whether that right has accrued before or after its commencement," and the words "whether that right has accrued before or after the commencement" only amplify this meaning. A right created by the Act may also be held to have accrued after the commencement of the Act. **Abas Ali Shah v. Sher Zaman**, 22 P. R. 1908 = 48 P. W. R. 1908 = 122 P. L. R. 1908.

CLARK, C. J. and REID, J.

9.—Punjab Acts—(Continued),**Act II of 1905 (Punjab Pre-emption)—(Contd.).**(6) *S. 11—"Tribe," meaning of—Sheikhs.*

Ethnological experts differing as to what constituted a tribe, the only reasonable construction of the term as used in S. 11 of the Pre-emption Act (1905) is the broadest possible. Consequently, the word "tribe" will necessarily indicate the principal tribe and not a branch of a tribe. The framers of the Act having given no assistance in the right interpretation of the term, the word "Sheikhs" will cover, consequently, Sheikhs of all classes, until some indication is given that the word "tribe" is used in a narrow sense. **Ali Muhammad v. Shaman**, 112 P. R. 1908.

KENSINGTON AND LAL CHAND, JJ.

(7) *Ss. 11 and 12—Sale of land by vendor not being member of agricultural tribe—Vendee being proprietor in the village, not coming within purview of proviso to S. 11 of Act—Said by member of agricultural tribe claiming pre-emption.*

Where a certain land had been sold by a vendor, who was not a member of an agricultural tribe, to a vendee, who was a proprietor in the village but who did not come within the purview of the proviso to S. 11 of the Punjab Pre-emption Act (II of 1905).

Held, that, the plaintiff, a member of the agricultural tribe, having a right of pre-emption under S. 12, had, therefore, a preferential right of pre-emption over that of the vendee (a)

The essence of pre-emption is that the right-holder has a better claim than some one else. Ss. 11 & 12 of the Act have been effectually drawn in such a way as to secure that lands, which had previously passed into the hands of persons not belonging to the privileged class of agricultural tribes, shall, under certain circumstances, revert to members of the privileged class, if they choose to exercise their legal rights. **Thakur Das v. Sohawa Singh**, 23 P. R. 1908—50 P. W. R. 1908—123 P. L. R. 1908.

ROBERTSON AND KENSINGTON, JJ.

Reference.—(a) 101 P. R. 1907, D & F.

(7-a) S. 12—Sec No. 7, *supra*.

(8) *S. 12 (a)—Pre-emption—Pre-emption based on relationship—Reversioner of a female included within the meaning of the section—Hindu Law—Inheritance.*

9.—Punjab Acts—(Continued).**Act II of 1905 (Punjab Pre-emption)—(Contd.).**

A, the male descendant of a female B, sold a property which B had inherited from her father C and others, the male descendants of B's real brother claimed pre-emption under S. 12 (a) of the Punjab Pre-emption Act, 1905, as the persons entitled to succeed to A in the event of his dying without heirs.

The lower appellate Court, disagreeing with the first Court, dismissed the suit on the ground that the plaintiffs would succeed in default of male lineal descendants of B, not by inheritance but by reversion, and they cannot therefore claim to be "persons who but for such sale would be entitled, to inherit the property" within the meaning of S. 12 (a) of Punjab Pre-emption Act, 1905.

Held, that, the above contention was not sound. According to 32 P. R. 1895 (F.B.), B, when he took the property acted as a mere conduit pipe for eventually transferring it to the real heirs, viz., the male descendants of her father, who would be the persons entitled to succeed in the event of A dying without heirs and therefore entitled to pre-empt under S. 12 (a) of the Act. The fact that A had other male heirs did not matter, for, they had not troubled to assert their right, and it is open to the more remote heirs to sue for pre-emption if the nearer heirs decline or omit to assert their rights (a)

Held, also that under Hindu Law, which is the personal law of the parties, the plaintiffs are *bandhus* and therefore ultimate heirs of the vendor **Dat Ram v. Siv Ram** 131 P. W. R. 1908.

CHATTERJI AND RATTIGAN JJ.

References.—(a) 21 P. R. 1908 = 46 P. W. R. 1908 and 32 P. R. 1895 (F. B.), F.

(8-a) *S. 12 (a)—Agricultural land given to daughter—Sale of such land by donee's descendants—Heirs of donor claiming pre-emption during existence of other descendants of the donee—Whether heirs of donor entitled.*

A sister was allowed by her brother to succeed to half of the ancestral land on the death of their father,

Held that, as, when she took the property, she acted as a mere conduit pipe for eventually transferring it to the real heirs, viz., the male descendants of her father, where a sale of such

9.—Punjab Acts—(Continued).**Act II of 1905 (Punjab Pre-emption) —(Contd.).**

land is made by her descendant, the heirs of the donor, in the absence of a claim by any male descendant of the donee, had the right to claim pre-emption of the land, under S. 12 (a) of the Act. **Datta Ram v. Shiv Ram**, 131. P. R. 1908.

CHATTERJI and RATTIGAN, JJ.

References.—21 P. R. 1908 *App* & 32 P. R. 1895, (F. B.) R.

(J) Ss. 12 (a), 14 and 18—*Sale of agricultural land to remote heirs while nearer heirs existed—Suit for pre-emption by another remote heir of equal degree of relationship with the vendees—Maintainability of suit.*

Where a plaintiff sued for pre-emption claiming that he had a superior right, being an owner in the village and an *alamqili*, whereas the vendees were neither, the vendor having sons and brothers who did not sue, and the Lower Court dismissed the suit on the ground that the plaintiff and the vendees were equally related to the vendor.

Held that cl. (a), S. 12 of the Act was applicable to the case though the nearer heirs had not sued for redemption, held, also that, under cl. (a), S. 12 of the Punjab Pre-emption Act, the right of pre-emption is conferred on the whole line of heirs, and not merely on the next and nearest heirs at the time of sale, it being further provided that the right *inter se* would be determined by the order of succession *i.e.*, the nearer heir would exclude the more remote, and that, under circumstances of the case, and under S. 18 of the Act, the plaintiff was not entitled to sue for pre-emption at all.

Held, further, that S. 14 of the Act refers to cases "where several pre-emptors are found by the Court to be equally entitled to the right of pre-emption," *i.e.*, are found to be equally entitled to acquire the property in preference, to another person, *i.e.*, the defendant vendee, and not to the case of a claimant who is not entitled to acquire the land in preference to the vendee. **Jang Bahadur Khan v. Karam Khan**, 21 P. R. 1908—16 P. W. R. 1908—114 P. L. R. 1908.

RATTIGAN and LAL CHAND, JJ.

Reference.—20 P. R. 1907, since *overruled* by 114 P. R. 1907, R.

9.—Punjab Acts—(Continued).**Act II of 1905 (Punjab Pre-emption) —(Contd.).**

(9-a) S. 14—See No. 9, *supra*.

(10) S. 14 (c)—*Rival pre-emptors—Equal interests—Preference.*

S. 14 (c) gives the vendor the right to elect between rival pre-emptors. The law, as it stands, leaves to the vendor the right of determination. So, among rival pre-emptors having equal interests, he who is selected by the vendor is to be preferred. **Ibrahim v. Iahli Bakhsh**, 88 P. R. 1908—154 P. W. R. 1908.

KENSINGTON and JOHNSTONE, JJ.

References—85 P. R. 1905 (F.B.), 102 P. R. 1881, 88 P. R. 1888, 43 P. R. 1903, *nat* L'.

(10 a) S. 18—See No. 9, *supra*.

(11) S. 22—*Giving a fancy price—Good faith—Pre-emption*

A person who, in his anxiety to purchase a particular plot of land or to purchase land in a particular village, gives a fancy price is acting in "good faith" within the terms of S. 22 of the Act, although his intention is to render it practically impossible for any one with a superior right of pre-emption to oust him.

An owner is not deprived by the Act of the privilege of selling for the highest price offered (a). **Niadar Mal v. Mukh Ram**, 13 P. R. 1908 = 23 P. W. R. 1908 = 106 P. L. R. 1908.

REID, J

Reference.—(a) 75 P. R. 1901, R.

(12) Vendee having superior right of pre-emption under the Punjab Laws Act to pre-emptor—whether saving clause of S. 2 (3) of Act II of 1905 protects him against pre-emptor having superior rights under Act II of 1905—Priorities under Punjab Laws Act (IV of 1872) and this Act—See PRE-EMPTION, No. 12, 18 P. W. R. 1908 (F.B.)

Act of State.

(1) *Jurisdiction of Civil Courts—Confiscation of timber felled in Native States.*

Plaintiffs, British Indian subjects, residing in Simla, sued the Secretary of State for India for the value of timber purchased by them from the Rana of Ghond, and confiscated by order of the Superintendent, Simla Hill States while it was within the limits of the Kotli States, preparatory to being brought into Simla. Under the Punjab Government Rules, the

9.—Punjab Acts—(Continued).**Act of State.—(Concluded).**

sanction of the State Forest Officer was necessary to the felling of the trees, and all trees, before being removed from the forest, were to be marked with the State sale hammer-mark, and any trees removed without such mark were liable to confiscation. The timber in question not having been so marked, *held* that the confiscation was the act of the Superintendent acting in his political capacity, in respect of a property of a Foreign State, and was done in foreign territory, and as such was not liable to be questioned in a Municipal Court in British India.

There cannot be an act of State by a sovereign against his own subjects. Such proposition, however, refers to an act directed towards the subject, and it does not refer to an act not directed towards the subject, but which indirectly implicates such subject **Kembo v. The Secretary of State for India**, 105 P.R. 1908.

CLARK, C.J., and CHATTERJI, J.

References.—L.J.R.P.C. (1899), 144, L.R. 19 Eq. 509, 6 Bom. L.R. 131, 7 M.I.A. 537, *L.*

(2)—of foreign sovereign has no operation beyond his own territory—See *JURISDICTION (GENERAL)*, No. 1, 12 C.W.N. 777.

Adjournment.

Pleader engaged transferring brief to another whose name not mentioned in vakalathnamah—Judge refusing to hear such pleader—Junior pleader not instructed to argue—Duty of Court to grant adjournment—See *ACT X OF 1859 (BENGAL RENT RECOVERY)*, No. 1, 7 C.L.J. 426.

Adjustment.

Money-decree against several defendants—Agreement discharging one of them—Part adjustment of decree—Certificate necessary. See *CIV. PRO. CODE*, No. 169, 4 M.L.T. 229.

Administration suit.

(1) *Estate belonging to a living Hindu—Civil Court—Competency to entertain the suit—Civil Procedure Code, S. 11.*

An administration suit brought to administer the estate of a living Hindu debtor cannot be maintained in a Civil Court. (a) **Gangaram Kaval v. Nagindas Khushaldas**, 10 Bom. L.R. 519 = 32 B. 381.

CHANDAVANKAR and HEATON, JJ.

9.—Punjab Acts—(Continued).**Administration suit.—(Concluded).**

References:—(a) 20 B. 96 = 6 Bom. L.R. 853 *Expl.*

(2)—by judgement-creditor against executor of deceased judgement-debtor, scope of—Whether suit merely concerned with execution of decree—See *CIV. PRO. CODE*, No. 131, 12 C.W.N. 614.

(3)—by heirs of the deceased—Subsequent administration suit by a creditor—Conduct of the suit. See *PRACTICE*, No. 15, 10 Bom. L.R. 1166.

Administrator.

(1) *Administrator pendente lite, position of, after suit—Interference—Executor de son tort—Applicability of principle to Hindus.*

On the termination of the appointment of an administrator *pendente lite* in respect of the property of a Hindu, if he continues to hold and deal with the property in the same way as he did prior to the date when his appointment came to an end, he can be sued as a *quasi executor de son tort*. **Kshish Chandra Acharjya Chowdhury v. Radhika Mohun Roy** 12 C.W.N. 237 = 3 M.L.T. 147 = 35 C. 276.

MACLEAN, C.J., HARRINGTON and FLETCHER, JJ.

(2) *Criminal misappropriation by—No express finding—General observations in judgment. effect of.*

Where there is no express finding in a judgment that a person was guilty of criminal misappropriation as regards any of the sums of money for which he, together with the other administrators, was held accountable, the general observations in the judgment, which go to show that, in the opinion of the Judge, that person, together with the other administrators had acted dishonestly, are not evidence that, as to any particular claim, that person was criminally liable. **Erasala Gurunathan Chetty v. Addipally Raghavalu Chetty**, 3 M.L.T. 394 = 8 Cr. L.J. 147.

WHITE C.J., and WALLIS, J.

References.—16 M. 99, 2 M.L.T. 529, *Appl.*, 6 A. 234, 27 M. 71, *D.*

(3)—, suit by—*v Letters* " must issue before he can sue—*Civ. Pro. Code*, S. 50—See *Civ. Pro. CODE*, No. 73, 12 C.W.N. 788.

9.—Punjab Acts—(Continued).

Administrator:—(Concluded).

Appointment of administrator *pendente lite*,—, no legal representative of creditor in existence.— See CONTRACT ACT, No. 1, 4 M.L.T. 335.

Administrator General and Official Trustees Act.

See ACT V OF 1902.

Admission.

(1) Statement in plaint unchallenged and made by putindar after transfer of interest not binding upon transferee—See REG. VIII OF 1819 (PUTNI), No 3, 7 C.L.J. 604.

(2)—by mortgagee cannot operate to make mortgage redeemable which by law was irredeemable at the time when the admission was made. See MORTGAGE (REDEMPTION), No 20, 11 O.C. 285.

(3) Effect of admission of defendant in suit based on unregistered document inadmissible in evidence. See REGISTRATION ACT, No. 5, 4 M. L. T. 354.

Adoption.

(1) *Person taken as an adopted child with the intention that he or she should inherit from adoptive parents, whether constitutes valid adoption.*

The taking of a person as an adopted son or daughter with the intention that he or she should inherit from the adoptive parents would constitute a valid adoption of the child as a *keethma* child. **Ma Gyi v. Ma Seik**, 14 Bur. L. R. 133.

IRWIN, O. C. J. & ORMOND,

(2)—inherently invalid—Need not be independently impugned—Limitation Act Art. 118—See MAHOMEDAN LAW (INHERITANCE), No. 1, 56 P. W. R. 1908.

(3) Representation by widow that she was authorised to adopt—Widow actually adopting a certain person—Suit by reversioner—Adopted son incurring heavy expenses to maintain adoption—Suit by widow for declaration of her incompetency to adopt—Widow estopped from maintaining suit. See ESTOPPEL, No. 1, 5 A. L. J. 568.

(4) See CUSTOMS (PUNJAB)

Adverse Possession.

(1)—*question of fact—Title—jurisdiction of District Judge in appeal.*

Where the plaintiff in a case claims title on the basis of adverse possession for more than

9.—Punjab Acts—(Continued).

Adverse Possession.—(Continued).

twelve years, it was held that the question whether the possession alleged was of such a kind as to enable the plaintiff to acquire a title was a question of fact, and that the District Judge had jurisdiction to decide that question in appeal on the evidence. **Muthusawmy Asari v. Ramasawmy Iyengar**, 3 M.L.T. 299.

WHITE, C. J., and MILLER, J. *

(2) *Plea of—in the alternative of a specific title.*

It is open to a party to allege a specific title and in the alternative, a title by 12 years' adverse possession. **May Yin v. Ma Pu**, 4 L. B. R. 238.

IRWIN, J.

Reference —1 C. 699, P.

(3) *Possession—One co-sharer—Joint property—Whether adverse possession.*

Exclusive possession of a co-owner of property which originally had been joint does not *per se* amount to adverse possession as against his co-sharers. Where one of the two sisters remained in possession of the father's property for twenty-one years and the other did not "participate in possession," held, that that only did not make her possession adverse (a). **Parbati v. Ram Prasad**, 5 A. L. J. 511—A. W. N. (1908), 239.

STANLEY, C. J., and KARAMAT HUSAIN, J.

References —(a) 1 C. L. R. 364, 3 C. W. N. 774, R.

(4) Assertion of limited interest—Whether can lead to acquisition by adverse possession of an absolute title—See JURISDICTION (OF CIVIL AND REVENUE COURTS), No. 4, 7 C.L.J. 499.

(5) Acquisition of limited interest by—See LIMITATION, No. 9, 17 M. L. J. 469—3 M. L. T. 187.

(6) Assertion of proprietary right by mortgagee after fruitless foreclosure proceedings—Mutation in Revenue records in his favour.—Whether he can start possession adverse to mortgagor—See MORTGAGE, No. 1, 90 P.L.R. 1908

(7) Usufructuary mortgage—Ouster of mortgagee—See MORTGAGE (USUFRUCTUARY), No. 1. A.W.N. (1908), 25.

(8)—of *maliki* and *shamsiat* land—Plaintiff suing defendants for recovery of land of which their father and they themselves recorded as *

9.—Punjab Acts—(Continued).**Adverse Possession:—(Concluded).**

proprietors in 1868 and 1892—In 1868 plaintiff's fathers recorded as minors—Defendant entered as in possession on their behalf—No adverse possession by defendant—See ABANDONMENT, No. 1, 97 P.W.R. 1908.

(9)—, title by, cannot be acquired by lessee entering into possession under lease, against lessor pending term of lease—Conditions for acquiring such possession—Mere non-payment of rent whether creates adverse possession in lessee's favour—See EVIDENCE ACT, No. 15 7 C.L.J. 615.

(10) Suit by landlord to resume occupancy right on the death of the widow of tenant—Plea of adverse possession by person claiming through widow. See OCCUPANCY RIGHTS, No. 1, 60 P.R. 1908.

(11) Suit for possession on title by purchase—Title not proved—Title by adverse possession not being inferrible from plant or issue—Effect. See POSSESSION, No. 8 4 M.L.T. 344

(12) Mahomedan widow in possession of property in lieu of dower—Loss of possession by widow—Adverse possession by stranger. See MAHOMEDAN LAW (WIDOW), No. 1, A.W.N. (1908), 256.

(13) See TRANSFER OF PROPERTY ACT, No. 8 4 M.L.T. 327.

(14) Common holding—Owner leaving his share in possession of co-sharee—Adverse possession, how established. See ABANDONMENT, No. 2, 120 P.R. 1908.

(15) Suit for possession—Plaintiffs alleging that defendants were tenants of other than suit lands and that by trespass they got suit land within 12 years before suit—Defendant's possession for more than 12 years proved—Effect. See POSSESSION No. 10, 8 C. L. J. 557

(16) Declaration of title based on—Claim based on adverse possession not set up in the plaint—Practice—Pleadings—See PRACTICE, No. 18, A. W. N. (1908), 277

Advocates.

Right of, to appear and plead instructed by vakils of the High Court—See PRACTICE, No. 4, 3 M. L. T. 322

Affidavit.

Where the facts in a petition to High Court appear sufficiently from the judgment of lower Courts, no affidavit need be filed. See CIV. PRO. CODE, No. 98, 8 C. L. J. 308.

9.—Punjab Acts—(Continued).**Agent.**

(1) Father accredited, of joint family consisting of father and sons—Father's representative without written authority—Act of father binding on sons—See HINDI LAW (JOINT FAMILY), No. 8, 12 C. W. N. 687

(2) Conditions for suing by agent—Absence of principal from jurisdiction—Objections first raised in second appeal—Maintainability. See CIV. PRO. CODE, No. 60, 4 I. B. R. 284.

(3) Pakky adat agency—Place of performance of a contract by a pakka adatia—Jurisdiction—See PAKKY ADAT AGENCY, No. 1, 10 Bom. L. R. 1230

(4) Receiver appointing *tahsildar*—Agent and sub-agent—Suit for accounts not maintainable against *tahsildar*—Sub-agent liable to render accounts to receiver. See ACCOUNTS, No. 7-a, 8 C. I. J. 111

(5)—See PRINCIPAL and AGENT

Agreement

Instalment bond executed by some of the judgment-debtors in decree-holder's favour in respect of decretal amount—Whether it is a mere agreement to give time—Whether the whole agreement illegal owing to the agreement to give time not having had Court's sanction—Right of decree-holder to sue upon it—See CIV. PRO. CODE, No. 167, 12 C. W. N. 674.

Alienation

(1)—by step-mother whether and when binding on step-son—See HINDI LAW (GUARDIANSHIP), No. 1, 4 N. L. R. 20.

(2)—by father—Necessity for sale established—Consideration for sale higher than the amount necessary to raise—Objection by sons validity of—See CIV. PRO. CODE, No. 257, 144 P. L. R. 1906=8 P. R. 1908

Where there is a custom of primogeniture—there is no restriction on the alienation by the incumbent for the time being, unless a special custom is proved to the contrary. See PRIMOGENITURE, No. 1, 8 C. L. J. 274.

Alienation of Land Act.

See ACT XIII OF 1900 (PUNJAB).

Alteration.

Bill of exchange or promissory note exhibit, ing the appearance of alteration—Whether the *onus* lies on the person suing to account for it

9.—Punjab Acts—(Continued).**Alteration :—(Concluded).**

—Whether in other documents the alteration is presumed to have been made before execution. See **BURDEN OF PROOF**, No. 4, 14 B.L.R. 218.

Alternative defence.

Possession either as a tenant or for more than twelve years. See **POSSESSION**, No 10, 8 C. L. J. 557.

Amendment.

(1)—of decree by way of amplification of its wording—Affirmation—Civ. Pro. Code, S 596—See **APPEAL TO PRIVY COUNCIL**, No. 1, 62 P.W.R. 1908.

(2) **Appeal** dismissed under S. 551—Court taking action under S. 551 is the only Court having jurisdiction to make—Amendment of decree. See **CIV. PRO. CODE**, No 301, A.W.N. (1908), 109

(3) Limitation for execution of amended decree. See **EXECUTION OF DECREE**, No 6, 8 10 O.C. 22.

(4) Plaintiff suing on a promissory note in favour of himself and others added as defendants—Plaintiff alone not entitled to amount claimed—Plaintiff allowed to amend plaint See **EXECUTION OF DECREE**, No. 19, 11 O.C. 225.

American authorities.

—value of—See **LIBEL**, No. 2, 12 C. W. N. 1053 (P. C.)

Ancestral Property.

(1) See **BAUBUANA, GRANT**, No. 2, 8 C.L.J. 124, No 1, 12 C. W. N. 966.

(2)—, definition of—*Onus probandi* of proving ancestral property on son—Ancestral property mixed up with self-acquired—Whole to be regarded as self-acquired—See **CUSTOMS (PUNJAB)**, —**ALIENATION** No. 18, 128 P.W.R. 1908 (P.C.).

Animal

(1) *Wild—Elephant—Escape and re-capture—Property of original owner when ceases.*

An elephant, after having been for a long time in a state of domestication, stayed from its owner, but was re-captured by another person and resumed its domestic habits on being re-captured.

Held, that this was conclusive proof that the animal was not wild and that the owner's property in it never ceased.

9.—Punjab Acts—(Continued).**Animal :—(Concluded).**

Whether, in any case, an elephant which escaped from a life of domestication was wild or not must be decided upon the circumstances of the case. One test is the *animus revertendi* and another, whether on re-capture the animal had or had not to be treated as a wild animal (a). **Mahadev Mohanta v. Boloram Gogain**, 12 C.W.N. 547 = 35 C. 413.

STEPHEN and HOLMWOOD, JJ.

Reference :—(a) 21 W.R. 75 (1873), 3 C.L.R. 515, considered.

Annuity

Suit to enforce arrears of annuity—Not a suit to enforce trust, but suit for money, had and received by defendants for plaintiff's use, or one in trover—Cognisable by the Presidency Small Cause Court—See **ACT XV OF 1882 (PRESIDENCY SMALL CAUSE COURT)**, No. 1, 10 Bom. L.R. 758

Appeal.

- (1) GENERAL.
- (2) SECOND APPEAL.
- (3) (TO PRIVY COUNCIL)

— 1—(General)

(1)—*against remand, when to be presented—Erroneous order carried out—Subsequent proceedings, whether void—Waiver—Final disposal of suit, date of—Validity of remand order when to be challenged—Civil Procedure Code (Act XIV of 1882), Ss. 562 and 564—Alternative but not co-existent remedy.*

Per STEPHEN, J.—An appeal against a remand order, presented before the suit is finally disposed of under that order, that is, before the final decree in the suit has been passed, is good, but a party cannot wait till the final disposal of the suit and then appeal against the interlocutory order without appealing from the decree in the suit.

Proceedings subsequent to an illegal order of remand might be valid under certain circumstances (a).

Per MOOKERJEE, J.—Although when a Court of first appeal, purporting to act under S. 562 of the Civil Procedure Code, remands a case to the Court of first instance which had not decided the suit merely on a preliminary point, the order is erroneous, yet if the order of remand has been carried out subsequent proceedings are not void merely because of such error, and

Appeal—(Continued).**—1—(General)—(Continued).**

will be set aside only if it is established that the erroneous remand order has affected the merits of the case. The error does not affect the jurisdiction of the Courts, and consequently may be cured by consent.

The provisions in Ss. 562 and 564 of the Civil Procedure Code were introduced for the benefit of litigants, so as to guard against a fresh trial of the whole cause in the Court of first instance and to protect them from the delay, trouble and expense of a fresh appeal, if, therefore, litigants find it the more advantageous course that the whole case should be re-tried and consent to such a procedure, an order of remand contrary to the provisions of S. 564 of the Civil Procedure Code is not null and void. A party who has consented to such an order is not entitled to treat it as void and incapable of being validated by consent or waiver (*b*).

Under some circumstances, the final disposal of the suit may be taken to be the delivery of the judgment.

When a litigant has the right to choose between two remedies which are not co-existent but alternative, he may select and adopt one as better adapted than the other, to work out his purpose, but once he has made his choice, and adopted one of the alternative remedies, his act at once operates as a bar as regards the other, and the bar is final and absolute.

Where an order of remand has been made, its validity may be challenged directly and immediately by an appeal under S. 588, cl. 28, or indirectly under S. 591, when an appeal is preferred against the final decree in the suit. The party affected by the order of remand should make his election. He may, if he chooses, prefer an appeal against the order of remand, and obtain a stay of proceedings during the pendency of the appeal; he may, on the other hand carry out the order of remand, take the chance of a successful termination of the suit in his favour and, in the event of defeat, prefer an appeal against the final decree in which the validity of the order of remand may be questioned. He cannot, however, if he has carried out the order of remand and taken the full benefit of it, turn round and prefer an appeal against the order of remand (*c*). **Balkunta Nath Day v. Nawab Salimullah Bahadur**, 6 C.L.J. 547 = 12 G.W.N. 590.

STEPHEN and MOOKERJEE, JJ.

Appeal—(Continued)**—1—(General)—(Continued).**

References—(a) 28 C. 324 = 5 C. W. N. 509, 7 C.L.J. 71, R. (b) 28 M. 437 = 15 M.L.J. 236, R (c) 5 C.L.J. 580, *cons.*

(2) *Arbitration—Award—Civ. Pro. Code, Act XIV of 1882, Ss. 520, 521, 522, 523, 524, 525 and 540—Revision—Distinction between Ss. 526 and 523, C.P.C., as regards appeal.*

An award was made by a private arbitration, appointed out of Court, in favour of N and S against S, M, and D, and in favour of D against S, M. Then N, S and D applied under S. 525 C.P.C. to have the award filed in Court. S & M raised certain objections which were disallowed by the District Judge who ordered "the award to be filed and decree passed in accordance with the terms thereof."

S & M appealed. At the hearing of the appeal two preliminary questions were raised—

1. Whether an appeal lies against an order under S. 526, C.P.C., directing an award to be filed.

2. If not, whether such an order is open to revision on the grounds urged in the appeal.

Held, by the Full Bench unanimously that an appeal does not lie from an order under S. 526, C.P.C., directing an award to be filed, nor from the decree passed in terms of the award as there is only one decree in the case, viz., the filing of the award and the consequences of the decree being passed in terms of the award, flow from that order and no fresh order is required for those consequences to result, but it is not so in proceedings under S. 523, C.P.C.

Held, also, that no revision lies in such like cases on the grounds on which no appeal is allowed (*a*).

Held, by the division Bench, that in the appeal no ground for interference on revision is shown. **Shankar Mal v. Nathu Mal**, 58 P. W. R. 1907 (F.B.) = 1 P.R. 1908.

CLARK, C. J., KENSINGTON and JOHNSTONE,

JJ

References—(a) 84 P.R. 1901 overruled by 25 P.R. 1902 (P.C.), 25 P.R. (1888) (P.C.), 89 P.R. 1902 (P.C.), 10 C.W.N. 601 and 11 C.L.J. 153, *followed*, 33 C. 757; 27 A. 526; 29 M. 203, *Diss.*

(3) *Suit for partition—Civil Procedure Code, S. 562—Remand—Appeal—Court fee.*

A District Judge, in appeal in a suit for a partition of a house, remanded the suit, after

Appeal—(Continued).**—1—(General)—(Continued).**

deciding to what fractional shares the parties were entitled, in order that the partition might be carried out by the Court of first instance. The District Judge, however, erroneously described his order as an order of remand under section 562 of the Code. *Held*, on appeal from such order, that the memorandum of appeal must be stamped as an appeal from a decree. **Umra Ali Khan v Abdul Subhan Khan**, A.W.N. (1908), 40—5 A.L.J. 545.

AIKMAN and KARAMAT HUSAIN, JJ.

Reference :—A.W.N. (1889) p. 193, *l'*.

(3-a) *Talukana, not filed within period fixed—Appeal, whether can be dismissed for default—Civ. Pro. Code, (Act XIV of 1882) S. 557.*

Held, that it was wrong for a Judge to dismiss an appeal before the date fixed for the hearing of the appeal had arrived, and before too it had been ascertained whether the notice to the respondents could or could not have been served by the date fixed for the hearing, on the simple ground of the failure of the appellants to deposit the necessary fees for issue of notices within the time fixed by the Court. **Chandra Nath Dass v. Kaliprasanna Chakravarti**, 35 C. 535.

BRETT and DOSS, JJ.

(3-b) *Court of additional District Judge—Transfer of appeal.*

Per Curiam—The Court of an Additional District Judge is a Court under the District Judge's administrative control and the District Judge is competent to make over to the Additional District Judge an appeal which he had withdrawn from a Subordinate Judge to whose file it had at first been transferred (a). **Rakha Chandra Tewary v. The Secretary of State for India in Council**, 10 C. W. N. 841—8 C. L. J. 34

RAMPINI and WOODROFFE, JJ.

References :—(a) 9 C. W. N. 705=32 C. 875 commented on.

(3-c) *Appeal presented on behalf of deceased party—Legal representative brought on record—Delay—Limitation Act, S. 5.*

Although an appeal presented on behalf of a deceased party may be bad, yet the Court has power, in a proper case, to treat the appeal as having been properly filed on the day on which the legal representatives were made parties to the appeal, and to excuse the delay under S. 5 of the Limitation Act, 1877. **Noothi**

Appeal—(Continued).**—1—(General)—(Continued).**

Subbarayadu v. Dara Lingayya Garu
Suryapracharalingam Garu, 18 M.L.J. 461.

BENSON and SANKARAN NAIK, JJ.

(3-d) *Decree—Remand—Civ. Procedure Code, S. 562—Declaratory suit relating to two pieces of land dismissed in toto by first Court upon preliminary point—Appellate Court dismissing suit as to one piece and remanding case as to the other piece—Inapplicability of C.P.C., S. 562—Illegality of order—Scope of appeal from order of remand.*

Plaintiff prayed for a declaratory decree of title to two plots of land, one in Lahore, the other in Ichra. The first Court dismissed the whole suit on the ground of want of jurisdiction. On appeal the Divisional Judge, agreeing with the first Court, confirmed the decree of dismissal as to the Lahore land, but reversed the decree as to the Ichra land, and remanded the suit as regards that portion of the claim under S. 562, Civil Procedure Code, for a decision on the merits.

Plaintiffs preferred an appeal under S. 588 to the Chief Court impugning the whole order of the Divisional Judge. Respondent contended that as the appeal was only from an order of remand under S. 562, Civil Procedure Code, the rest of the order could not be attacked upon such appeal.

Held, (i) that the appellant cannot be deprived of the right of appeal as to the Lahore land simply because of the form of the Divisional Judge's order, which, while finally adjudicating upon the plaintiff's claim to the Lahore land, was not incorporated in any decree from which an appeal might be preferred.

(ii) That S. 562, C.P.C., was inapplicable to the case, as the Divisional Judge, on appeal, did not reverse the decree of the first Court upon a preliminary point, but upheld it to the extent of the claim to the Lahore land, and reversed it only in part.

(iii) The order was illegal also, because, if acted upon, it would result in two decrees being passed in one and the same suit, which is illegal. Unless the decree as a whole is reversed upon the preliminary point, a remand under S. 562, C. P. C., is not permissible (a). **Amolak Shah v. Charan Das**, 149 P. W. R. (1908).

RATTIGAN and LAL CHAND, JJ.

Reference :—3 P. R. 1892, F.

Appeal—(Continued).**1—(General)—(Continued).****(4) Suit—Dismissal—Appeal by plaintiff and defendant—Procedure.**

Plaintiff brought an action for ejectment which was dismissed on the ground that it had been brought for a part of the tenancy, and therefore, not maintainable. The plaintiff appealed and the defendant also filed an appeal against a finding in the judgment as to the nature of the tenancy. The Judge decreed the defendant's appeal and affirmed the order of dismissal:

Held, that the procedure was erroneous. As the suit had been dismissed, the defendant could not appeal. The plaintiff's appeal should have been heard first, and if his grounds proved to have been well-founded, the defendant's objections should then have been considered. **Aga Mohammad Medhi Tehar Ali v. Umesh Chandra Chatterji**, 8 C.L.J. 552.

RAMPINI and MOOKERJEE, JJ.

(4-a) Application as further appeal, when admissible.

In this case an application was admitted as a further appeal as there was a question of custom involved and the case was one of sufficient importance. **Khan Muhammad v. Sher Muhammad**, 136 P.R. 1908 (note case, p. 622).

SIR CHARLES ROE, C.J., and FRIZELLE, J.

(5) Proceedings commenced under the old Act—Right of appeal given by the new Act, whether can be of any avail—Right of appeal, not a matter of procedure—See ACT III of 1876 (MAMLAIDAR'S COURTS), No. 1, 10 Bom. L. R. 330.

(6) Appeal dismissed under S 551, C.P.C.—Applicability of provisions of S 574, C.P.C. in their entirety to such case. See CIV. PRO. CODE, No. 327, A.W.N. (1908), 115

(7) Objections by respondent against a party not appellant in the, and having distinct interest, whether permissible—See SPECIFIC RELIEF ACT (I of 1877), No. 1, 11 O.C. 93

(8)—Whether lies from order of Court of Agent to Governor at Vizagapatnam—See ACT VII of 1889 (SUCCESSION CERTIFICATE), No. 7, 3 M.L.T. 264.

(9) Suit relating to charity—Suit by Advocate-General at instance of relators—Dismissal of suit—Right of appeal—See CIV. PRO. CODE, No. 291, 9 Bom. L.R. 996=32 B. 155.

Appeal—(Continued).**1—(General)—(Continued).**

(10)—against the decision of the Assistant Collector on a question of proprietary title—See JURISDICTION (CIVIL AND REVENUE COURTS), No. 7, 4 A.L.J. 686=30 A. 25.

(11)—from orders governed by procedure of S. 561, C.P.C.—See CIV. PRO. CODE, No. 310, 3 M.L.T. 248.

(12) Order of District Judge sanctioning a mortgage in favour of a particular person in preference to another—Whether appeal lies. See ACT VIII of 1890 (GUARDIAN AND WARD), No. 5, 11 O.C. 29.

(13)—by one of several unsuccessful defendants—Want of jurisdiction in appellate Court to decree claim against the successful defendant in absence of appeal by plaintiff—Costs—See JURISDICTION (ON CIVIL COURTS), No. 2, 57 P.W.R. 1908.

(14) Order of Court refusing to make conditional decree for foreclosure absolute, whether appealable. See MORTGAGE (FORECLOSURE), No. 1, 1 N.L.R. 51.

(15) Impossibility of restoring parties in *statu quo*—Order as to stay of execution—Right of appeal—See EXECUTION OF DECREE, No. 9, 3 M.L.T. 307.

(16) Additional evidence on appeal, when admissible—See CIV. PRO. CODE, No. 323, 3 M.L.T. 308.

(17) Decree in favour of plaintiff for portion of his claim—Execution of such decree—Whether he can prosecute appeal as regards portion of claim dismissed—See EXECUTION OF DECREE, No. 2, 31 P.R. 1907.

(18) Application of judgment-debtor for resale after confirmation for sale—Dismissal of application for default—Dismissal of further application for review—Right of appeal—See CIV. PRO. CODE, No. 211, 25 P.R. 1907.

(19) -from *ex parte* decree and application to set it aside, whether may be proceeded with simultaneously. See CIV. PRO. CODE, No. 91, 12 C.W.N. 885.

(20) Whether appeal lies from an order of remand after decision of the suit in compliance with the order. See CIV. PRO. CODE, No. 314, A.W.N. (1908), 76.

(21) -if lies against an order reversing an order setting aside a sale. See CIV. PRO. CODE, No. 706, 7 C.L.J. 282.

Appeal—(Continued).**—1—(General)—(Continued).**

(22) Method of computing period of limitation prescribed for appeal—See **LIMITATION ACT**, No. 16, 14 B. R. 8.

(23) Appellate order confirming order returning plaint for amendment not open to revision, but may be questioned in appeal from final order rejecting plaint, if any—See **CIV. PRO. CODE**, No. 76, 15 P.W.R. 1908.

(24)—against Court's order striking out co-defendant's name—See **CIV. PRO. CODE**, No. 58, 71 P.R. 1907=37 P.L.R. 1908.

(25)—, question as to want of jurisdiction appearing on the face of pleadings cannot for the first time be raised in—See **JURISDICTION (GENERAL)**, No. 2, 7 C.L.J. 152.

(26)—, whether, lies against order dismissing application opposing execution of property, claimed as trust-property—See **CIV. PRO. CODE**, No. 158, 18 M.L.J. 21.

(27)—does not lie against order rejecting application, under S. 103, **CIV. PRO. CODE**, for reviving application, under S. 311, of the Code, dismissed for default—Express language necessary to create appellate jurisdiction—See **CIV. PRO. CODE**, No. 89, 10 O.C. 353.

(28)—from a decree passed after remand—Appellant whether allowed to re-open the decision on which the remand is made—See **CIV. PRO. CODE**, No. 312 10 O.C. 350.

(29)—, Whether order refusing to re-admit appeal rejected for appellant's failure to furnish security for costs of respondent under S. 549, **CIV. PRO. CODE**, is open to—See **CIV. PRO. CODE**, No. 298, 5 A.L.J. 109.

(30)—Whether and when, lies against award made a rule of Court and the basis of a decree—No difference between decree based on private award and on one made through the Court's intervention—See **CIV. PRO. CODE**, No. 282, A.W.N. 1908 54.

(31) Suit for declaration that plaintiff is sole owner of an orchard—Partition of village *shamlat*—Land Suit—Appeal. See **ACT XVIII OF 1884 (PUNJAB COURTS)**, No. 1, 4 P. R. 1908.

(32) Time spent in review—Whether deducted in computing period of limitation for appeal—See **LIMITATION**, No. 1 66 P. W. R. 1908.

(33)—from remand order—Chief Court's power to go into merits of the case—See **CIV. PRO. CODE**, No. 321, 38 P. R. 1908.

Appeal—(Continued).**-1—(General)—(Continued).**

(34) Order refusing to file agreement to refer to arbitration—Whether appeal lies—See **CIV. PRO. CODE**, No. 283, 11 O. C. 116.

(35) Order returning plaint for presentation to proper Court—Submission to the order—Right of, effect on—See **JURISDICTION (OF CIVIL COURTS)**, No. 1, 11 O. C. 98.

(36) An—lies from an order refusing to file an award—See **CIV. PRO. CODE**, No. 288, 4 L. B. R. 130.

(37) Whether order refusing to grant sale certificate appealable—Conditions for being appealable—See **CIV. PRO. CODE**, No. 143, 7 C. L. J. 436.

(38)—, if lies against order refusing to grant application to file award under S. 525, **C.P.C.**—See **CIV. PRO. CODE**, No. 285, 7 C. L. J. 486.

(39) Whether orders in passing Receiver's accounts open to—See **CIV. PRO. CODE**, No. 271, 12 C.W.N. 648.

(40)—entertained without jurisdiction—Procedure for setting aside—**CIV. PRO. CODE**, S. 622—See **ACT VIII OF 1885 (TENANCY, BENGAL)**, No. 28, 12 C.W.N. 835.

(41) Depositing appeal memo in the box put up by an appellate Court for the purpose—Proper presentation—Sufficient cause—Limitation Act, S. 5—See **LIMITATION**, No. 3, 71 P.W.R. 1908.

(42) Order of Court of higher grade causing property to be put up for sale in execution of lower Court's decree whether appealable—Proceedings under S. 244, **C.P.C.**—See **EXECUTION OF DECREE**, No. 12, 11 O.C. 41.

(43)—, Whether lies against order of Judge sitting on the original side directing security from a woman—See **CIV. PRO. CODE**, No. 239 10 Bom. L. R. 337.

(44) Whether lies against order of Judge sitting on original side, where it decides question of some right between the parties—See **PRACTICE**, No. 2, 10 Bom. L. R. 488.

(45)—against final decree in partition suit Correctness of preliminary order or decree for partition without appealing against such order within limitation time, whether questionable by appellant—See **CIV. PRO. CODE**, No. 109, 10 Bom. L. R. 514.

(46)—lies to High Court, under S. 54, **Land Acquisition Act**, only from final award of Court—Whether it lies from award merely determin-

Appeal—(Continued).**—1—(General)—(Continued).**

ing amount of gross sum payable as compensation, as preliminary to further question, to whom amount so determined should be paid—See ACT I OF 1894 (LAND ACQUISITION), No. 21, 10 Bom. L.R. 517.

(47)—Power of Court to make co-defendant liable upon, by defendant in mortgage suit—Alteration of decree—See APPELLATE COURT, No. 1, 12 C. W. N. 720.

(48)—Appeal from decree—Appeal not pressed—Limitation—See LIMITATION ACT, No. 128, A. W. N. (1908), 161.

(49) Party can only succeed *secundum allegata et probata*—Decision on these allegations—Now case in appeal not allowed. See PRACTICE, No. 10, 10 Bom. L.R. 768.

(50) Compromise decree not in accordance with relief claimed for in the plaint. See CIV. PRO. CODE, No. 236, 77 P.R. 1908.

(51) Order of Deputy Commissioner granting or refusing sanction to permanent alienation of land—Appeal from the order. See ACT XIII OF 1900, (PUNJAB) No. 3, 4 P.R. 1908 (Rev.)

(52) Question of jurisdiction when entertainable in appeal—See JURISDICTION (GENERAL), No. 5, 8 C.L.J. 116

(53) Official Assignee—Disallowance of claim of Official Assignee to have proceeds of sale in execution of decree against insolvent judgment-debtor paid to him—Appeal—See CIV. PRO. CODE, No. 146, A.W.N. (1908), 203.

(54) Jurisdiction of Court to deal with objections except those made by persons who were parties before Collector and which brought about reference. See ACT I OF 1894 (LAND ACQUISITION), No. 7 and 8, 12 C. W. N. 985, 12 C. W. N. 987.

(55) Ss. 25, 27 and 54, Land Acquisition Act (1894)—Award of costs. See ACT I OF 1894 (LAND ACQUISITION), No. 17, 31 M. 328

(56) Order made pursuant to an appellate decree by a subordinate Court, whether appealable. See CIV. PRO. CODE, No. 144, 4 M. L. T. 92.

(57) Letters Patent, appeal—Whether confined to points differed—See LETTERS PATENT, No. 1, 4 M. L. T. 110.

(58) Compensation money paid to Hindu widow—Reversioner's application for reference to Civil Court—Order by Judge on reference directing refund of money already paid by

Appeal—(Continued),**—1—(General)—(Continued).**

Collector—Order not one under S. 32, Land Acquisition Act—Incompetency of Judge to proceed under S. 32—No appeal from order under S. 32—Power of High Court to interfere in revision. See ACT I OF 1894 (LAND ACQUISITION), No. 19, 12 C. W. N. 1039.

(59) Order refusing application for order absolute under S. 89, Transfer of Property Act—Appeal from order—*Ad valorem* Court-fee on value of appeal should be paid on memorandum of appeal. See COURT-FEE, No. 3, 12 C.W.N. 1028

(60) Right of one of several appellants to withdraw his appeal as to his share only. See CUSTOMS (PUNJAB)—INHERITANCE AND SUCCESSION, No. 18, 119 P.W.R. 1908.

(61) Mortgage suit wherein conditional decree for foreclosure, under S. 86 T.P. Act, is passed—Proceedings under S. 87—Suit to be regarded as pending—Whether an appeal will lie from such proceedings—See TRANSFER OF PROPERTY ACT, No. 52, 4 N.L.R. 158.

(62)—by some of the defendants—Date of appellate decree forms the basis from which limitation runs, even in case of those who have not appealed against the decree. See CIV. PRO. CODE, No. 153, 10 Bom. L.R. 939.

(63) Plaintiff suing for possession or return of purchase-money—Decree for possession—Appeal—Appellate Court decreeing return of purchase money, legality of—Necessity for memo of objections. See CIV. PRO. CODE, No. 308, 4 M. L.T. 266

(64) Rejection of application to be declared insolvent—Appeal—See CIV. PRO. CODE, No. 225, 98 P.R. 1908.

(65) Pedigree accepted by Court of first instance as proved—Appellate Court considering evidence of pedigree worthless—Whether plaintiffs were estopped from seeking to sustain first Court's finding in their favour. See HINDU LAW (SUCCESSION), No. 9, 13 C.W.N. 1 (P. C.)

(66) Decree passed by Small Causes Court—Attachment and sale of immovable property—Decree sent for execution to Munsif—Appeal lies to District Judge—Ss. 27 and 35, Small Causes Courts Act. See CIV. PRO. CODE, No. 119, 5 A.L.J. 612.

(67) Arbitration—Award—Set aside under ground not contemplated by S. 521, G.P.C.—Appeal, whether lies. See CIV. PRO. CODE, No. 28, A.W.N. (1908), 242.

Appeal—(Continued).**——1—(General)—(Continued).**

(68) —from order not appealable treated as revision. See CIV. PRO. CODE, No. 198, 4 M. L.T. 352.

(69) Rejection of appeal under S. 549, C.P.C.—Application for restoration. See CIV. PRO. CODE, No. 300, 4 M.L.T. 416.

(70) Recommendation by Subordinate Judge to District Judge as to the appointment of a Receiver—Refusal by the latter to appoint—Right of appeal. See CIV. PRO. CODE, No. 270, 10 Bom. L.R. 1037.

(71) Decree passed in accordance with award by arbitrator—Whether appeal lies. See ARBITRATION, No. 3, 12 C.W.N. 585 (P C)

(72)—against decree in terms of revised award—Illegality of order of remittal. See CIV. PRO. CODE, No. 279, 4 M.L.T. 328.

(73) The Court to which appeal lies is determined by the value of suit—Lower Burma Courts Act, 1900, S. 28. See VALUATION OF SUIT, No. 4, 4 L.B.R. 279

(74)—presented in a wrong Court—Carelessness or oversight of appellant or pleader—Sufficient cause. See LIMITATION ACT, No. 5, 118 P.R. 1908.

(75) —against arbitrators' award—Appeal lies only if decree, not judgment, is in excess of award. See CIV. PRO. CODE, No. 275, 8 C.L.J. 475.

(76) Mistake in partition made by Revenue Court—No suit in Civil Court to remedy it—Appeal against order confirming partition. See PARTITION, No. 7, 5 A.L.J. 725.

(77) Redemption suit—Cognizable by Munsiff—Subordinate Judge returning plaint for presentation to proper Court—Appeal to District Judge. See ACT VII OF 1887 (SUITS VALUATION), No. 2, 5 A.L.J. 713.

(78) Declaratory suit to set aside alienation—Dismissal of suit—Appeal by some only of the plaintiffs—Duty of Appellate Court. See MAHOMEDAN LAW (LEGITIMACY) No. 1, 190 P. L.R. 1908.

(79) Withdrawal of appeal—Costs—Hearing of Memorandum of objections. See PRACTICE, No. 16, 4 M.L.T. 482.

(80)—against order by Subordinate Judge, in Insolvency proceedings—S. 588, C.P.C., 1882—See CIV. PRO. CODE No. 340, 4 M.L.T. 455.

Appeal—(Continued).**——1—(General)—(Concluded).**

(81) Number of appeals that will lie from an order granting sanction to prosecute. See SANCTION TO PROSECUTE, No. 3, A.W.N. (1908), 290.

(82) Objection taken for the first time before Appellate Court. See CIV. PRO. CODE, No. 200-a 18 M.L.J. 562.

(83) S. 215—A, Civ. Pro. Code,—Preliminary decree—Appeal—Court fees. See COURT FEES ACT, No. 2-a, 150 P.R. 1908.

(84) Order granting succession certificate—Conditional on giving security—S. 19, Succession Certificate Act, 1889. See ACT VII OF 1889 (SUCCESSION CERTIFICATE), No. 7-a, 139 P. R. 1908.

(85) Order of remand passed by a single Judge of High Court—Whether "judgment"—Letters Patent, S. 15—Whether appeal lies. See CIV. PRO. CODE, No. 315-a, C. 1096.

——2—(Second Appeal)

(1) *Insistence to go into point not taken in lower Courts*

The second appellate Court has no jurisdiction to go into the point as to which the parties have neither joined issue nor discussed in either of the lower Courts. **Yenkatasubramania Yathiyar v. Subramania Iyer**, 3 M. L. T. 314.

BENSON & MUNRO, JJ.

(1-a) *Grounds of second appeal not affecting the jurisdiction of the Court or the merits of the case, but relating to order of lower appellate Court remanding case for amendment of plaint by having it signed by person duly authorised in that behalf—Whether second appeal lies on such ground—Civ. Pro. Code, S. 578.*

In a second appeal to the Chief Court the grounds of appeal were that both the lower Courts had erred in law in not having rejected the plaint, inasmuch as it was not signed by any person duly authorized in that behalf, and that the lower appellate Court was wrong in remanding the case for amendment for the plaint, when the plaint was not properly and duly signed.

Held, these grounds did not affect the jurisdiction of the Court or the merits of the case.

Held, also, under the circumstances of the case, S. 578 of the Civ. Pro. Code debarred the Court from reversing or varying the decree,

Appeal—(Continued).**——1—(Second Appeal)—(Continued).**

whether the orders of the lower Court were right or wrong. **Obendur Rahman Chowdry v. R. M. A. K. M. Palaneappa Chetty**, 14 Bur. L.R. 122.

SIR CHRISTIAN E. FOX, C.J.

(2) *Ground of appeal taken in lower appellate Court not argued there—whether bars its being taken in second appeal—Notice, sufficiency of.*

Where the notice on which a party relies is only a four days' notice it was held that it was clearly insufficient in law.

The fact that a ground of appeal taken in the lower appellate Court was not argued there-in does not prevent its being taken in second appeal (a). **Ramachandra v. Laxmipathaya**, 9 M.L.T. 293.

WALLIS and SANKARAN NAIR, JJ.

Reference :—(a) 18 M 83, R.

(3) *Finding of fact based upon an incorrect view of the law—Civ. Pro. Code, S 584—Joint Hindu family—Separate transactions by individual members—Writings of separate possession in village records, effect of.*

Held that, where the parties have not had the benefit of a proper discussion of the materials on record, based upon a correct view of the law applicable to the same, such as they are entitled to receive from a Court of First Appeal, the proper course is to set aside the decree and remand the suit under S 562, Code of Civ. Procedure.

Held further, that neither the mere occurrence of separate transactions on the part of individual members of a joint Hindu family, nor the fact that property was entered as their separate possession in the village papers, is in any way conclusive on the question of separation (a). **Ram Sewak v. Musammat Ram Dei**, 11 O.C. 264.

PIGGOTT, J.

Reference :—(a) 13 M.I.A. 542, R.

(3-a) *Letting in evidence in—Evidence not placed before the Lower Appellate Court.*

A party can validly object to the letting in of fresh evidence, not placed before the Lower Appellate Court, in second appeal. **The Secretary of State for India v. Manjeshwar Krishnaya**, 81 M. 415.

WHITE, C.J., DAVIES & BENSON, JJ.

References :—28 B. 4, and 18 M. 480, R.

Appeal—(Continued).**——2—(Second Appeal)—(Continued).**

(4) Subordinate Court erroneously exercising jurisdiction by rejecting documents that ought to have been received—Power of High Court in second appeal. See CIV. PRO. CODE, No. 100, 12 C.W.N. 312.

(5) *Finding of fact based on misconception of what is the evidence whether can be accepted as a legal finding in second appeal—See HINDU LAW (GUARDIANSHIP), No. 1, 4 N.L.R. 20.*

(6) No first appeal against respondent—Whether decree can be passed against him in second appeal. See REGISTRATION ACT, No. 4, 12 C.W.N. 625.

(7) Custom—Finding in favour of existence of custom based upon illegal or legally insufficient evidence—Question of law—High Court entitled in second appeal to consider validity of finding. See CUSTOM No. 1, A.W. N. (1903), 112.

(8) Suit to recover value of plaintiff's share in produce of lands belonging to him and defendant jointly—Denial by defendant in written statement—Question of title arose only incidentally—Suit cognizable by Court of Small Causes—No second appeal. See CIV. PRO. CODE, No. 338, 10 Bom. L. R. 733.

(9) Concurrent findings of three Courts on question of fact—High Court will not interfere in second appeal. See TRANSFER OF PROPERTY ACT, No. 31, 13 C. W. N. 40.

(10) Delay in presenting second appeal—dismissal—Power of High Court to extend time for payment. See HIGH COURT, No. 2, 4 M. L. T. 341.

(11) Suit for arrears of rent—Tenant denying relation of landlord and tenant—Question of proprietary title—Right of second appeal to District Judge—See ACT II of 1901 (TENANCY, AGRA), No. 14, 5 A. L. J. 128.

(12) Question as to the weight which the lower Appellate Court should have given to certain documents, or that the lower Appellate Court misunderstood the result of first Court's local investigation is no ground of second appeal—See CHARTER ACT No. 1, 13 C. W. N. 105.

(13) Suit for rent—Defendant contesting plaintiff's ownership as to all the lands—Question as to amount of annual rent payable raised by decision—Appeal against decree lies. See ACT VIII of 1885 (BENGAL TENANCY), No. 27, 8 C. L. J. 519.

Appeal—(Concluded).**—2—(Second Appeal)—(Concluded).**

(14) Defect in the appellate judgment is a ground of second appeal—See CIV. PRO. CODE, No. 327-a, 13 C.W.N. 143.

—3—(To Privy Council).

(1) *Permission of appeal to Privy Council—Amendment of Decree by way of amplification of its wording—Affirmation—Insufficient time given to produce evidence—Foreclosure proceedings—Defective notice—Substantial question of law (Civ. Pro. Code, (Act XII of 1882), S. 596*

Held, that, where on appeal, the decree of the first Court has been so far amended as to include therein expressly, plaintiff's rights in the *Shamlat Doh* and *Shamlat Pathi* with other appurtenant rights as claimed, but has otherwise been confirmed on all points, the decree has been practically affirmed within the meaning of the last clause of S. 596, C.P.C.—the addition made is simply an amplification of its wording and does not amount to a variation so as to give right of appeal to his Majesty in Council.

Held, also, that none of the following defects is fatal to the foreclosure proceedings and constitutes a substantial question of law under S. 596, C.P.C.

(a) That the notice was bound to state the actual area claimed and not merely the 1½ Biswas' share actually entered in the mortgage-deed.

(b) That as there were two deeds of mortgage, two separate notices were required, notwithstanding the fact that the second deed was one of further charge only.

Held further, that a vague assertion to the effect that sufficient opportunity was not given for producing witnesses cannot be treated as a substantial question of law. **Diwan Abdul Hakim v. Hari Lal**, 62 P.W.R. 1908.

KENSINGTON and LAL CHAND, JJ.

(2) Order of High Court suspending a pleader from practice—Leave to appeal to Privy Council—Procedure—See LETTERS PATENT, No. 1, 10 Bom. L. R. 21.

(3)—against Punjab Chief Court's order of remand—Such order not a final decree—See CIV. PRO. CODE, No. 322, 52 P. R. 1907.

(4) On question of waiver—Question of fact—See WAIVER, No. 1, 11 C. W. N. 739 (P. C.)

Appeal—(Continued).**—3—(To Privy Council)—(Continued).**

(5) Power of Court to extend time for giving security. See CIV. PRO. CODE, No. 348, 87 P. R. 1908.

(6)—, if lies from Governor-General's agent in Bhopal. See ARBITRATION, No. 3 12 C. W. N. 585 (P. C.)

Appellate Court

(1) *Power to make co-defendant liable upon appeal by a defendant—Mortgage-suit.*

In an appeal by defendants Nos. 2 to 8 against the decision of the 1st Court in which the real contest was whether defendant No. 1 who was joined as a respondent with the plaintiffs or defendants Nos. 2 to 8 were liable for the mortgage-debt, the Appellate Court has power to alter the decree of the 1st Court so as to make defendant No. 1 liable and to direct that a decree to recover the mortgage debt against defendant No. 1 be made in favor of plaintiff **Ishwardhary Singh v. Bibi Saheb-zadi**, 12 C. W. N. 720—35 C. 538.

BRETT and COXE, JJ.

(2)—, whether can make out new case for the first time in appeal, contrary to pleadings in first Court—See CIV. PRO. CODE, No. 109, 10 Bom. L. R. 514

(3) Lower Courts of appeal always to raise points for determination—Controversial points narrowed—No room for complaint in second appeals—Duty of Court—See CIV. PRO. CODE, No. 324, 10 Bom. L. R. 492.

(4) *Ex parte* decree for plaintiff without hearing all available witnesses—Dismissal of suit by Appellate Court—Its duty to remand the case to lower Court to be retried to give opportunity to plaintiff to examine all witnesses—See PROCEDURE, No. 1, A. W. N. (1908), 140.

(5) Power of, to question admissibility of document, admitted by Court of first instance. See STAMP ACT (II of 1899), No. 5, 108 P. R. 1908

(6) Appellate Court, whether has power to remand a case for second decision except as provided by S. 562, Civ. Pro. Code, (1882). See CIV. PRO. CODE, No. 317-b, 138 P. R. 1908.

Application.

(1) Order striking off an application, and one dismissing it for default, no substantial distinction between. See MESNE PROFITS, No. 4, 12 C. W. N. 3=7 C. L. J. 301.

Application—(Concluded).

(2)—for bringing on record the representative of a deceased respondent in second appeal—Limitation period prescribed by Art. 175 C, and not Art. 178, Limitation Act.—See LIMITATION ACT, No. 117, 10 Bom. L. R. 509.

(3) Application as further appeal—Grounds of admissibility—See APPEAL (GENERAL), No. 4-a 136 P. R. 1908 (note case, page 622).

Apportionment.

Principle of—of mesne profits and interest thereon, were decree for mesne profits was satisfied by some, out of the entire body of persons liable, by payments made from time to time—See MESNE PROFITS, No. 2, 7 C. L. J. 454.

Appropriation of payment

See CREDITOR, No. 1, 4 M. L. T. 326.

Arbitration.

(1) *Award set aside by Court of first instance—District Courts setting aside such decision—Decision on merits.*

Where a suit was referred to arbitration and an award was made thereon, the defendant applied to set aside the award. The award was set aside, and, the suit having come on for decision on the merits, it was determined in favour of the defendant. The plaintiff appealed and the District Judge, in appeal, decided that the Munsiff was wrong in setting aside the award and, without going into the merits, reversed the decree of the Munsiff and entered judgment in accordance with the award in favour of the plaintiff. *Held*, the District Judge had authority to inquire into, and decide as to the propriety or otherwise of a decision of a Munsiff setting aside an award. **K. Achuthayya v. N. S. Thimmayya**, 3 M. L. T. 315—18 M. L. J. 228 = 31 M. 345.

BODDAM and SANKARAN NAIR, JJ.

References—3 A. 636, 5 A. 293, 11 C. 172, 14 W. R. 327, 8 C.W.N. 392, 26 B. 551 and 22 M. 202, F; 28 A. 408, 4 A. L. J. 256, *Diss.*

(2) *Oral submission—Arbitration Act (IX of 1899)—Necessity for submission in writing—Award on oral submission—Validity—Civil Procedure Code (Act XIV of 1882), S. 375—Adjustment of suit—Award on oral submission not an adjustment.*

The parties to an administration suit consented (at the hearing), to its being referred to the Commissioner to take the usual accounts and to determine their respective shares.

Arbitration—(Continued).

Accounts and Objections were filed before the Assistant Commissioner, and the parties appeared before him, when it was orally agreed, to save the costs of a lengthy inquiry, that the Assistant Commissioner should deal summarily with all matters in dispute and draft terms by which the parties were to be finally bound, and the Assistant Commissioner personally explained to defendants 1 and 6 that they would be bound by his decision even if he decided to give them one rupee. To this they agreed. The Assistant Commissioner in due course arrived at a decision, but defendants 1 and 6 considered that it awarded them an insufficient amount and declined to be bound by it. Upon application being made by plaintiff that an adjustment of the suit might be recorded under S. 375 of the Civil Procedure Code, on the basis of the Assistant Commissioner's decision.

Held, that there had been no adjustment of the suit. There had been no written submission to arbitration as provided by S. 4 of the Indian Arbitration Act, and, consequently, there had been no legal and valid reference to arbitration and the Assistant Commissioner's award (for it really was an award and nothing else) had no legal foundation and could have no legal consequences. As there had been no reference to arbitration and no award, there had been no adjustment.

Semble, that the Indian Arbitration Act applies to such an arbitration.

Where a special procedure is provided for extraordinary extra-judicial methods of settling disputed claims, *Semble*, that it was the intention of the Legislature that that procedure and no other was to be followed (a). **Rukhanbai v. Adamji Shaik Rajibhai**, 10 Bom. L. R. 365.

BEAMAN, J.

Reference :—(a) 20 B. 304 and 26 B. 76, commented on and distinguished.

(3) *Award—Decree passed thereon—Appeal—Appeal from Governor-General's Agent in Bhopal to the Privy Council—Native State*

No appeal lies from a decree passed in accordance with the award made by an arbitrator to whom matters in dispute in the suit had been referred for decision.

Quere.—Whether an appeal lies to His Majesty in Council from a decision of the Governor-General's Agent at Schore in Bhopal.

Arbitration—(Continued).

Hansraj v. Sundar Lal, 12 C. W. N. 585 (P. C.)=7 C. L. J. 520=138 P. L. R. 1908=10 Bóm. L. R. 581=18 M. L. J. 266=99 P. W. R. 1908=14 Bur. L. R. 146=4 M. L. T. 25=80 P. R. 1908=35 C. 648.

LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

- (4) *Indian Arbitration Act (IX of 1899), S. 14—Bengal Chamber of Commerce, arbitration by the—rules of the—Indian Stamp Act (II of 1899), Ss. 5, 6 and 35, sch. I, Arts. 5 and 43—"Submission" required to be proved and stamped—Award made out of time—Enlargement of time after expiry of original time—Concealment of names and appointment of arbitrators—Notification of time and place of hearing—Frustration, refusal to hear, when misconduct—Award against a firm—Jurisdiction of Court to set aside award, if may be ousted.*

Contract-notes which contain a provision for the submission of disputes to arbitration ought each to bear eight annas stamp under Art. 5, Sch. I of the Indian Stamp Act, 1899, as an agreement not otherwise provided for in the schedule.

Although the Indian Arbitration Act, 1899, has made the procedure for the enforcement of an award simpler than the old practice of instituting suit for the purpose, it is still necessary to prove that the arbitrators acted under a valid submission, before an award can be made a decree of Court under the Act (a)

The Rules for the guidance of the arbitration 'tribunal' of the Bengal Chamber of Commerce were construed to contemplate the parties being notified of the names and the fact of the appointment of the arbitrators.

Where the arbitrators appointed by the Bengal Chamber of Commerce under its rules did not appoint a time and place for the hearing of the reference,

held, that the arbitrators failed in their duty in not doing so.

Whether the arbitrators should or should not hear evidence and the parties by counsel or otherwise must depend on the particular circumstances of every case, the arbitrators exercising, in a judicial manner, their discretion in the matter.

The refusal to hear evidence in a case where the arbitrators cannot decide a matter in dispute without hearing evidence would amount

Arbitration—(Continued).

to a misconduct on the part of the arbitrators. It is improper for the arbitrators not to hear evidence to ascertain as to who are the persons liable on a contract entered into in the name of a firm.

An award made against a firm, without ascertaining as to who are the persons who constitute it, is, on the face of it, bad and no Court can make a decree, in such circumstances, upon the award, against a firm.

It is not competent for the parties by an agreement to oust the jurisdiction of the Court vested in it by S. 14 of the Indian Arbitration Act, 1899, to set aside an award, if misconduct on the part of the arbitrators were shown or if it were shown that the award was improperly procured, when the parties desire that the award should be enforced under the provisions of the Act. **Hurdwary Mull v. Ahmed Musaji Selaji**, 13 C. W. N. 63.

FLETCHER, J.

Reference—7 B and C. 427, R.

(5)—whether Judge has power to refer dispute as to who should be the guardian of a minor to—See ACT VIII OF 1890 (GUARDIANS and WARDs), No. 1, 5 A. L. J. 101.

(6) Agreement to refer to arbitration—Appeal from order of reference—See CIV. PRO. CODE, No. 4, 126 P. R. 1907=88 P. W. R. 1907=50 P. L. R. 1908.

(7) Award of arbitrators—Suit for specific performance of contract of sale—Subsequent suit for possession—Maintainability—See CIV. PRO. CODE, No. 66, 4 N. L. R. 14.

(8) Order of reference to—not fixing period within which award is to be made—S. 508, CIV. PRO. CODE—Effect—See CIV. PRO. CODE, No. 273, A. W. N. (1908), 59.

(9) Reference to arbitration by judge on parties, oral application—Judge superseding the reference where legal arbitrator not having declined to act—See CIV. PRO. CODE, No. 272, 4 A. L. J. 691=30 A. 32.

(10) Refusal of umpire to act—Power of Court to appoint a fresh umpire—CIV. PRO. CODE, S. 510—See CIV. PRO. CODE, No. 276, A. W. N. (1908), 159.

(11) Death of one of the plaintiffs before termination of proceedings discovered after award—Court setting aside award—Incompetency of Court to make second order on same agreement. See CIV. PRO. CODE, No. 274 A. W. N. (1908), 228.

Arbitration—(Concluded).

(12) Want of provision for difference of opinion among arbitrators, where award is unanimous, will not invalidate award. See CIV. PRO. CODE, No. 275, 8 C.L.J. 475.

(13)—See ACT IX OF 1899 (ARBITRATION).

(14)—See AWARD.

Aims Act.

See ACT XI OF 1873.

Arrears of rent.

—due under sub-lease payable to lessor's zamindar are debt—Liability to be attached and sold under S. 266, C. P. C. See CIV. PRO. CODE, No. 173, 5 A. L. J. 265.

Arrest.

Arrest before judgment.—Damages for wrongful arrest. Damages for arrest cannot be tried by counter claim—Practice. See HIGH COURT RULES (BOMBAY), No. 4, 10 Bom. L. R. 1002.

Articles of association.

—construction of—See ACT VI OF 1882, (COMPANIES), No. 1, 3 M.L.T. 250.

Assessment.

(1)—of damages may be approximately stated in plaint with offer to pay additional Court fee if more damages are found due—S. 50, Civ. Pro. Code does not prevent it—See COURT FEES ACT, No. 11, 17 M.L.J. 625.

(2)—of tax by Municipality—Jurisdiction of Civil Courts to review same—See ACT III OF 1884 (BENGAL MUNICIPALITIES), No. 1, 12 C. W. N. 709.

Assets.

Commission earned by insolvent on policies of insurance is not salary or emolument under S. 27, Insolvent Act, but an asset—See INSOLVENT ACT (11 & 12, Vic, Ch. 21), No. 3, 10 Bom. L. R. 579.

Assignment.

• (1) *Validity of, by way of mortgage—Conditional assignment—Assignee's right—law applicable to the Punjab.*

An assignment of the assignor's interest in a certain sum due from a third party, "until certain advances made by the assignee to the assignor had been paid off with interest," is a conditional assignment. And a charge or a conditional assignment is not such an assignment as gives the assignee all the rights which, under the Judicature Act, he can have, only

Assignment—(Continued).

when the assignment is absolute, i.e., when it absolutely vests the property in him.

So, a person, to whom a non-negotiable promissory-note is assigned by the payee, as security for a debt due from the payee to the assignee, until the debt due to the assignee remains unpaid, cannot, as such an assignment is only conditional, sue the maker of the pro-note, in his own name, for recovery of the amount due on the note (a).

Neither the Judicature Act nor the Transfer of Property Act is, in terms, in force in the Punjab, and the Court is at liberty to adopt such provisions of the one or the other, as appear to it to be consonant with the general principles of law and equity **Nihal Chand v. Ali Baksh**, 9 P. R. 1907—41 P. W. R. 1907—25 P. L. R. 1908.

RATTIGAN, J.

References—(a) L. R. 1 Q. B. (1898) 765, F'; 12 P. R. 1894, 1 A. 732, R.

(2)—*by co-owner without objection by others—Assignment of whole of the debt due to a shop—Validity.*

Where a co-owner assigned the whole debt due to a shop to the plaintiff, and the other co-owner who was made a party to the suit did not question the assignment, it was held, that, under such circumstances, the assignment was good for the whole amount. **Malai Kolandal Chetty v. Royar Pillai**, 3 M.L.T. 294.

WALLIS, J.

(3) *Assignment pendente lite—Addition of assignee as co-defendant after period of limitation, effect of—See LIMITATION ACT, No. 31, 3 P. R. 1907.*

(4) *Suit on a promissory-note—Suit by assignee—Assignment found to be not made in fact—Effect—See ACT X OF 1873 (OATH), No. 1, 3 M.L.T. 163.*

(5)—*fraudulent, of debt not really existing—assignee whether bound to assume non-existence of debt as set forth in debtor's written statement—See LIMITATION ACT, No. 61, 18 M.L.J. 19.*

(6)—*of property in promissory-note, whether can be effectively made on mere delivery of it to plaintiff, for a suit to be filed on it, for no consideration—See PROMISSORY NOTE, No. 1, 14 Bur. L. R. 25.*

(7) *Assignment by mortgagee of mortgage debt without consideration—Benamidar's right*

Assignment—(Concluded).

to sue on such assignment. See *BENAMI TRANSACTIONS*, No. 3, 12 C.W.N. 409.

(8) Unfair and unconscionable nature of assignment, a question between assignor and assignee not for third parties. See *HINDU LAW (WOMAN'S ESTATE)*, No. 1, 12 C.W.N. 393.

(9) Mismanagement of trust—Management made over to Municipality—Suit by Municipality on a mortgage document belonging to trust—Maintainability of suit on document without assignment in writing—See *ACT IV of 1884 (MADRAS DISTRICT MUNICIPALITIES)*, No. 2, 3 M.L.T. 241.

(10)—of decree—Whether its validity can be questioned after assignee is made substituted decree-holder—See *REGISTRATION ACT*, No. 1, 12 C. W. N. 625

(11)—of invalid mortgage—Rights of assignee as against mortgagor and subsequent mortgagee for consideration—Scope of S. 53, Transfer of Property Act—See *MORTGAGE (GENERAL)*, No. 1-a, A. W. N. (1908), 116.

(12) Contract to assign patta—Legality of contract of insurance—See *CONTRACT*, No. 4, 3 M. L. T. 393.

(13) Mere fact that parties describe a transaction as a "lien" or "charge" cannot deprive it of its real nature, if, in substance, the transaction is an assignment. See *LEAS*, No. 4, 10 Bom. L. R. 1146.

(14)—of trade mark without the business confers no right. See *TRADE MARK*, No. 2, 13 C. W. N. 82

Attachment.

(1) *Execution-proceedings—Property attached by one creditor—Another creditor's claim under S. 295, C. P. C., 1882—Latter creditor obtaining order for rateable share of assets in sale proceeds of property attached by former—Withdrawal of attachment, private alienation after—Right of assignee—Transfer for good and valuable consideration in favour of one creditor—Obvious effect of such transfer to delay claim of less active creditor—S. 274, C. P. C.*

On the application by a judgment-creditor for execution of his decree and for attachment of the judgment-debtor's property, the property which was immovable was duly attached under S. 274, C. P. C., subsequent to this, another decree-holder holding a decree against the same judgment debtor filed an application for execution and in this application he set out

Attachment—(Continued).

the facts that the former judgment-creditor had already applied for execution of his decree and had succeeded in having the property attached. He, therefore, prayed that the said property might be held to be attached also in respect of his application of execution, and that he might be permitted to share rateably in the proceeds of the sale of the property (S. 295 of the Code). *Held* that, when the decree, in execution of which the property was attached was satisfied and there had been a withdrawal of the attachment, the latter decree-holder, obtaining an order in accordance with his prayer for a rateable share in the assets in the proceeds of sale of property attached by the former creditor had no right to claim the benefit of the attachment.

Where after the removal of such attachment, such property was assigned to a certain person *held*, that the assignee had a good title as against the latter decree holder.

An alienation obtained by one creditor for a genuine consideration which is not inadequate, is not necessarily void, because its obvious effect will be to defeat or delay the claim of a less vigilant creditor. *Lahori Mal v. Gangaram*, 91 P. R. 1908=148 P. W. R. 1908.

RATTIGAN and LAL CHAND, JJ.

References—(a) 7 A. 702, 15 C. 771, 25 A. 131, 28 M. 380 (b) 6 P. R. 1901, 21 P. R. 1875, 25 B. 202, *It.*

(2) Provident Fund established by Calcutta Corporation to which Provident Funds Act applies is not liable to—See *ACT IX of 1897 (PROVIDENT FUNDS)*, No. 1, 12 C. W. N. 633.

(2-a) Bare right to receive profits not yet accrued, whether liable to be attached in execution of decree—See *CIV. PROC. CODE*, No. 171 A. W. N. (1908), 101

(3) Objection to, successful—but costs not allowed—Recovery of costs—See *COSTS*, No. 1 A. W. N. (1908), 18.

(4) Small Cause Court's power to award compensation for erroneous attachment before judgment—See *SMALL CAUSE COURT*, No. 1 77 P. R. 1907=50 P. W. R. 1907.

(5) Rent—Attachment for a larger sum than is due—Validity—See *ACT VIII of 1865 (RENT RECOVERY, MADRAS)*, No. 7, 17 M. L. J. 479.

(6)—of debt stops not running of interest. See *Contract Act*, No. 1, 4 M. L. T. 335.

(7)—prior to judgment—Application for rateable distribution—Ss. 213, 295 and 490, C. P.

Attachment—(Concluded).

C. (1882)^d See CIV. PRO. CODE, No. 115, 1 M. L. T. 348.

(8)—of arrears of rent due under sublease. See CIV. PRO. CODE, No. 173, 5 A. L. J. 265

(9)—Personal right—Hindu widow's right of residence—See HINDU LAW (WIDOW), No. 17, 4 M. L. T. 485.

Attestation.

(1)—of mortgage bond by son of deceased mortgagor whether renders him liable as if he were a mortgagor—See HINDU LAW (JOINT FAMILY), No. 2, 7 C. L. J. 195.

(2)—of mortgage deed, when valid—See TRANSFER OF PROPERTY ACT, No. 29, 3 M. L. T. 300.

(3) Attesting witness is a witness who has seen the deed executed and who signs it as a witness—Signature by Registrar under S. 63-A of the Deccan Agriculturists' Relief Act—Signature by writer of deed—Not valid attestations. See TRANSFER OF PROPERTY ACT, No. 30, 10 Bom. L. R. 943.

(4) Instrument not attested as required by S. 59, Transfer of Property Act—Effect. See TRANSFER OF PROPERTY ACT, No. 32, 31 M. L. T. 337.

(5)—of *zupeshgi* patta executed by *paradanshi* lady. See TRANSFER OF PROPERTY ACT, No. 31, 13 C. W. N. 40.

Attorney.

(1) *Unprofessional conduct—Attorney appearing for plaintiff and defendant.*

An attorney who in the name of a firm of which he was the sole partner appeared on behalf of the plaintiff, also appeared in his own personal capacity for the defendants.

Held, that he was guilty of contempt of Court and of improper behaviour, and must be suspended. *In the matter of Lawrence Wilson, an Attorney*, 8 C. L. J. 165 (F B.)—8 Cr. L. J. 131—4 M. L. T. 153.

^a RAMPINI, A. C. J., STREPLIS and FLECHER, JJ.

Attorney and client.

(1) Suit for costs by attorney against client—Limitation—Order for taxation of costs, effect of—See LIMITATION ACT, No. 20, 35 C. 171.

(2) Settlement of untaxed bills between attorney and client, re-opening of—Attorney sometimes bound to advise clients to take independent advice—But he is not bound to see

Attorney and client—(Concluded).

that new attorney selected discharges his duties properly. See CIV. PRO. CODE, No. 1, 12 C. W. N. 1102.

Attorneyship examination.

(1) *Board of Examiners, discretion of—Mandamus—Jurisdiction of the Court to interfere—Letters Patent, 1865, cls. 9 & 10 Specific Relief Act (1 of 1877), S. 45—Rules of the High Court, Nos. 111 to 118 and 132.*

Semble, the Court has no jurisdiction to interfere with the discretion of the Board of Examiners and cannot, where there is a discretion imposed on any body, issue a writ of mandamus to compel that body to exercise that discretion in any particular way, but can only compel the exercise of that discretion in a manner fair, candid and unprejudiced and not arbitrary, capricious or biased, much less warped by resentment or personal dislike.

Per Woodroffe, J—The Court cannot dispense with the production of the certificate mentioned in rule No. 116 of the Original Side of the High Court.

The Court will not interfere with the conscientious exercise by the examiners of the discretion which the Court has confided in them. *In the matter of Purna Chandra Dutt*, an attested clerk, 12 C. W. N. 873—1 M. L. T. 157—35 C. 915.

RAMPINI C. J., BRILL, and WOODROFFE, JJ.

Auction-purchaser.

(1)—being also decree-holder, whether party within meaning of S. 244, C. P. C.—See CIV. PRO. CODE, No. 113, 7 C. L. J. 436.

(2) Right to sue for possession—See CIV. PRO. CODE, No. 160, 5 A. L. J. 20.

(3) Title of, when accused—See CIV. PRO. CODE, No. 212, 7 C. L. J. 1.

Auction sale.

(1) *Combination of bidders—Cause of action—Pleadings—Fraud—Specific allegations, want of.*

Allegations of fraud must be specifically pleaded, general allegations, however strong may be the words, being insufficient to amount to an averment of fraud of which any Court ought to take notice (a).

The fact, that a combination amongst bidders at an auction sale has been formed to bid at the auction, does not, of itself, give rise to

Auction sale.—(Concluded).

an action at the suit of the vendor (b) **Lala Jyotiprakash Nande v. Jhewmull Jhewry**, 18 C. W. N. 87.

FLETCHER, J.

References :—(a) 5 A.C. 685 (1880), 15 C. 533. F.

(b) 6 C. L. J. 111, 3 Brod. & Bing. 116, 6 Car. & P. 239, Diss. 15 Jur. 259, R.

Award.

(1). *Mere dissatisfaction does not render an award ineffectual—Agreement to repudiate.*

Held that an award has the force of a binding contract or final judgment unless there has been an agreement to repudiate it, the mere expression of dissatisfaction with it by both the parties, being insufficient to render it ineffectual. **Pokerdas Bolumal**, 1 Sind L. R. 286.

KNIGHT and CROUCH, A. J. C. S.

(2)—made in private arbitration adopted by Court and decree passed thereon, whether and when appealable—whether any difference between such award and one made through Court's intervention—See CIV. PRO. CODE, No. 282, A. W. N. (1908), 54.

(3) Private award—Order directing award to be filed under S. 526, C. P. C., whether appealable—See APPEAL (GENERAL), No. 2, 58 P. W. R. 1907. (F.B).

(4) Destruction of, after presentation in Court—Whether ground for refusing to file the award. See CIV. PRO. CODE, No. 286, 1 Sind. L. R. 167.

(5) Award of arbitrators in excess of their authority—Effect—See CIV. PRO. CODE, No. 277, 1 Sind. L. R. 209

(6)—, application to file, order refusing—Appeal—Civ. Pro. Code, S. 525—See CIV. PRO. CODE, No. 285, 1 C. L. J. 486.

(7)—Order dismissing application to set aside award, whether decree—See ACT IX OF 1899 (ARBITRATION), No. 3, 14 Bur. L. R. 129.

(8)—, of arbitrators made out of Court—Order refusing to file such award—Appealability—See CIV. PRO. CODE, No. 287, 100 P. R. 1907.

(9)—by Collector under Land Acquisition Act, when disturbed by Court—See ACT I OF 1894 (LAND ACQUISITION), No. 3, 10 Bom. L. R. 660.

Award.—(Concluded).

(10) Enforcement of award of compensation in a seduction case—Courts have only to look to the provisions of S. 520 and S. 521, Civ. Pro. Code, See CIVIL PROCEDURE CODE, No. 278, U. B. R. (1908), 2nd Quarter, Civil, Procedure, p. 19.

(11) Reference to arbitration—Award—Award set aside upon ground not contemplated by S. 541, Civ. Pro. Code—Appeal. See CIV. PRO. CODE, No. 281, A.W.N. (1908), 242.

(12) Decree on revised award—Appealability. See CIV. PRO. CODE, No. 279, 4 M. L. T. 328.

(13) Conditions of a valid award under Land Acquisition Act—When it is deemed to be "made." See ACT I OF 1894 (LAND ACQUISITION), No. 9, 125 P. R. 1908.

(14)—See ARBITRATION.

Babuana grant.

(1) *Dubhanga Raj*—*Babuana grant*—*Mortgage by grantee*—*Legal necessity*—*Alienability*—*Ancestral property*.

Property granted as *babuana* to junior members of the family by the Maharaja of Dubhanga is ancestral property and is governed by the ordinary rules of Mitakshara law to which the Raj itself would be subject but for the peculiar custom necessary for its continuance as a Raj.

Such property is alienable for legal necessity (a).

(a). **Bhabeshwar Singh v. Rai Babu Ganga Pershad Singh Bahadur**, 12 C. W. N. 966.

MITTRA and CASPERSEZ, JJ.

References :—(a) 10 C. W. N. 978—33 C. 1158 and 12 C. W. N. 958, F.

(2) *Babuana grant of ancestral property*—*Grantee's estate, nature of*—*Custom*—*Burden of proof*—*Partition*—*Babuana grant, nature of*.

Per curiam.—Landed property acquired by a grand father and distributed among his sons does not, by such gift, become their self-acquired property so as to enable them to dispose of it to the prejudice of the grandsons. (a).

A *Babuana* grant of ancestral property by the owner of an impartible estate to ensure for the benefit not only of a junior member of the family but of his male descendants in the direct line does not lose its ancestral character by the grant. It does not become self-ac-

Babuana grant—(Concluded).

quired property in the hands of the grantee or his direct male descendants. Hence the other members of the family have the rights in it which they can claim under the Mitakshara Law, that is, the right to restrain alienation except in cases of legal necessity and the right to claim partition: and the original grantee has no power to dispose of the property by Will (b).

The custom which operates in the case of the Raj itself does not apply to a *Babuana* grant without the requisite proof which is necessary in such cases. The burden of proof lies upon the person seeking to establish the particular custom and to take this out of the ordinary category of Hindu family property.

Per Brett, J.—A *Babuana* grant is made to a junior member of the family and to his descendants in the male line for their maintenance. The grant is not of a portion of landed property to pay off a certain fixed sum of money which the grantee is entitled to claim on account of his maintenance from the Raja, but it is a grant for the maintenance of the grantee and his male descendants so long as there are any. **Lalitshar Singh v Bhabeshwar Singh**, 8 C. L.J. 124 = 12 C. W. N. 958 = 35 C. 823.

BRETT and CHITTY, JJ.

References—(a) 6 M. I. A. 165, F. (b) 33 C. 1158, F.

(3) ———Revenue and cess, liability for——
Durbhanga Raj—Contribution—Interest—
Tenure-holder—Proprietor.

Held, in respect of a *babuana* grant of certain mehals in the Darbhanga Raj, that the plaintiff Maharaja and the defendants (holders of the *babuana* grant) are neither co-proprietors, nor are the latter tenure-holders under the former;

so that, in accordance with the *sanad*, the defendants must pay all Government dues, (including cesses), through the plaintiff, and if the plaintiff pays the amount, he is to be fully reimbursed by the defendants;

that interest on cesses payable by the defendant should be allowed at the rate of 12 per cent, per mensem, as in a contribution suit **Lalitshwar Singh v. Maharaja Rameshwar Singh Bahadur**, 13 C. W. N. 118.

MITRA, & CASPERSE, JJ.

Bailment.

Entrusting for repair the driving beam of a sewing machine to coppersmith—Degree of care required of the coppersmith—Burden of proof—See CONTRACT ACT, No. 32, U. B. R. (1908), 1st Quarter, Contract, p. 11.

Batta.

(1)—Whether an *abirab*—Whether claim for, enforceable at law—See SANAD, No. 1, 7 C. L.J. 202.

(2) Agriculturist-defendant summoned to be examined under S. 7 of the Dekhan Agriculturists' Relief Act—Payment of *batta*, not necessary. See ACT XVII OF 1879 (DEKHAN AGRICULTURISTS' RELIEF), No. 3, 10 Bom. L. R. 1163.

Benami Transactions.

(1) *Benami transfer for illegal purpose of defrauding creditors*—Such purpose not carried out—Suit for specific performance of contract to sell property to third person—Right of transferor to resist such suit on the ground that transfer was benami.

Where the owner of property transferred it, *benami*, to another for an illegal purpose, *e. g.*, that of defeating creditors, and such purpose was not carried out into execution, *held*, with reference to S. 84 (a) of the Indian Trust Act, 1882, that a suit for specific performance of a contract by the transferee to sell the lands to a third person can be successfully resisted (b) by the transferor, on the ground that the transfer was a mere *benami* transaction. **Munisami Mudaliar v. Subbarayar**, 3 M. L. T. 244 = 18 M.L.J. 151 = 31 M. 97.

WALLIS and SANKARAN NAIR, JJ.

References—(a) 24 Q. B. D. 742, 33 C. 976 R; 31 B. 405, D; 20 M. 326, *considered*; (b) L. R. 9 Eq. 475 and 1 Q. B. D. 291, 18 M. 378 (387), F, 23 C. 962, R.

(2) *Decree against benamidar—Beneficial owner*—Bound by the decree—Subsequent suit for redemption.

A decree passed against a *benamidar*, in a suit brought against him, binds the beneficial owner, just in the same way as a decree in a suit brought by a *benamidar*. Where a decree gave the *benamidar* an opportunity to redeem, and he did not avail himself of it, *held*, that the beneficial owner could not maintain a suit to redeem. **Kanis Fatima v. Wali-Ullah**, 4 A. L. J. 689 = A. W. N. (1907), 272 = 30 A. 30.

AIKMAN, J.

Benami Transactions—(Continued).**(3) Benamidar, right of suit by—Mortgage—Conveyance without consideration, test of.**

A benamidar cannot bring a suit for recovery of a mortgage debt.

A mortgagee assigned over his interest under the mortgage to the plaintiffs who instituted the present suit against the mortgagors for recovery of the mortgage debt. It was found that the assignment was a *benami* transaction and was intended to put the mortgagors into difficulty.

Held, that the plaintiff's suit was rightly dismissed (a).

The mere non-passing of consideration is not sufficient to show that a transaction is *benami*.
Munshi Basiruddin Ahmed v Mahomed Jallah Patwari, 12 C. W. N. 409

MITRA and CASPERZ, JJ.

References—(a) 9 C. W. N. 477-32 I. A. 113=27 A. 271, D. 6 M. I. A. 53 (P. C.), 16 C. 364, 30 C. 265, 15 B. L. R. 10=2 I. A. 113, R.

(4) Benami transfer—Fraudulent object defeated—Right of owner to recover from benamidar—Limitation—Limitation Act (XV of 1877), Sch. II, Arts. 91 and 141

Where a *benami* deed of transfer of land was executed with the object of defrauding creditors, but the object failed.

Held—That the owner was entitled to recover the land from the benamidar, (a) and that without being required to set aside the deed as a preliminary

Art 144 and not Art 91 of Sch. II of the Limitation Act therefore applied to the suit.
Petherpermal Chetty v. Muniandi Serrai, 12 C. W. N. 562 (P. C.)=5 A. L. J. 290=7 C. L. J. 528=14 Bur. L. R. 109=10 Bom. L. R. 590=19 M. L. J. 277=35 C. 551=4 M. L. T. 12=4 L. B. R. 266.

LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

References—(a) 1 Q. B. D. 291, L. R. 9 Eq. 475 (479) & 26 Ch. D. 616, *relied on*; 24 Q. B. D. 742, R.

(5) Transaction, whether benami—Oral evidence unsatisfactory—Surrounding circumstances and considerations of probability to be looked into

Where the question was whether a document, which, on its face, was a mortgage-bond, was a genuine or a fictitious transaction, but at the

Benami Transactions—(Concluded).

trial persons, who might have been expected to be prominent witnesses, were not called, and the evidence that was called was open to much adverse criticism.

Held that, in the circumstances, it was necessary to rely largely upon the surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions and their subsequent conduct.
Dalib Singh v. Chaudhrai Nawal Kunwar, 12 C. W. N. 609 (P. C.)=10 Bom. L. R. 600=14 Bur. L. R. 151=4 M. L. T. 141=90 A. 259.

LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

(6) Purchase benami—Revenue sale.

The law does not preclude a person from contending that the purchase was made for him *benami* by a purchaser at a Revenue sale.
Yenkatachallam Pillai v. Purshotama Naicker, 4 M. L. T. 316.

MUNRO and PINNEY, JJ.

References—29 M. 473, F; 25 M. 655, R.

(7) Beneficial owner entitled to apply for setting aside of a sale in execution of a decree for money against benamidar. See CIV. PRO. CODE, No. 204, 8 C. L. J. 305.

Beneficiaries

—, when to be joined as parties—See HINDU TEMPLE, No. 1, 12 C. W. N. 946.

Bequest

Direction in will for feeding and paying Brahmins, whether valid. See HINDU LAW (WILLS), No. 8, 12 C. W. N. 1083

Berar.

Hindu Law of Mitakshara as interpreted in Bombay *lex loci* of—See HINDU LAW (INHERITANCE), No. 3, 4 N. L. R. 31.

Berar Land Revenue Code.

Pre-emption in Berar is a right created by statute—Co-occupant in survey number, whose interest is sold by auction for satisfying mortgage decree, not entitled to sue for pre-emption regarding shares so sold. See PRE-EMPTION, No. 29, 4 N. L. R. 138.

Bhagdari and Nervadari Act.

See ACT V of 1862 (BOMBAY).

Bhopal.

Governor-General's agent in Bhopal, decision of—whether appeal lies to Privy Council

Bhopal—(Concluded).

—See ARBITRATION, No. 3. 12 C.W.N. 585 (P.C.)

Bill of exchange.

(1) First of exchange, payable on demand, stamped with one anna stamp—Whether second of exchange should be stamped also. See STAMP ACT, (II OF 1899), No. 2, 4 L.B.R. 320 (F. B.)

(2) Nattukottai Chetty's way of signing and drawing bills—Consideration of question whether signature in bill is that of the principal or agent—Construction. See ACT XXVI of 1881 (NEGOTIABLE INSTRUMENTS), No. 41, 4 M.L.T. 309.

Bill of lading.

Liability of carrier for negligence—Effect of conditions in, claiming exemption from liability—See CARRIERS, No. 1, 4 M.L.T. 110

Board of Revenue.

Letter from, showing that jaghs are resumable on the death of grantee—Admissibility in evidence—See EVIDENCE ACT, No. 6, 7 C.L.J. 90.

Bond.

(1)—, partner signing, signed for himself and as agent of another partner, admissibility of oral evidence as to whether—See EVIDENCE ACT, No. 19, 18 M.L.J. 1.

(2) Instrument evidencing loan of paddy and providing for its return on certain date, whether bond—See LIMITATION REGULATION (TRAVANCORE), No. 1, 23 T.J.L.R. 48.

(3) Settlement of accounts, and execution of receipt for amount found due—whether constitutes bond—See ACCOUNTS, No. 3, 23 T.L.R. 17.

Buddhist Law.

(1)—GENERAL.

(2)—ADOPTION.

(3)—DIVORCE.

(4)—ECCELESIASTICAL.

(5)—INHERITANCE.

(6)—MARRIAGE.

(7)—PRE-EMPTION.

—1—General.

(1) Maiden lady bringing up two girls and a boy—One girl's father administering estate under Letters of Administration—

Buddhist Law—(Continued).**—1—General—(Continued).**

Other girl suing and getting decree for whole estate as keittima adopted daughter of deceased—Suit on behalf of first girl—Boy put on record as party—Decree against second girl directing her to pay 1/3 share to first girl and another third share to boy.

A maiden lady, deceased, had three persons living with her, (1) S, the daughter of B, with whose father the deceased was living, (2) P, a boy, and (3) L, another girl. On her death, Y, the father of S applied, as father and guardian of S, for Letters of Administration to the estate of the deceased, and obtained it from the Court. A similar application was also made on behalf of L, but was refused. L, thereupon, instituted a suit in *forma pauperis* against the estate of the deceased, administered by Y, for possession of the whole of it, as *keittima* adopted daughter of the deceased. The suit, to which S and P were wrongly not made parties, and which was very badly conducted, was resisted by Y, but was finally decreed in favour of L as the adopted child of the deceased entitled to inherit. Afterwards, the sister of Y, instituted, as next friend of S, the present suit on the ground that, S not being a party to the former suit, the decrees in it were not binding on her, and that she alone was entitled to the whole estate. P, who wished to put forward his claim, was permitted to be put on the record as second plaintiff in a suit in which the original plaintiff claimed the whole estate. The suit was decreed in favour of S, who was held by the District Judge to have been adopted by the deceased and not L and P.

Held that S's right to share in the estate as *keittima* adopted daughter of the deceased had been proved and that L should make or pay over 1/3 share of the property, which she had obtained or may hereafter obtain from Y under the decree in the former suit, to the properly constituted guardian of S, that L's right to share in the estate as *keittima* adopted child having been established in the former suit where S's claim was represented fully, the question of L's right to share in the estate should not have been gone into in the suit.

Regarding P, though the evidence of his having been adopted was not so strong, yet, the deceased having brought him up also, and Y, the person who should have known best the position P occupied in the house, having ad-

Buddhist Law—(Continued).**—1—General—(Concluded).**

mitted, shortly after the death of the deceased, that P was one of three children adopted by the deceased, *held*, setting aside the decree of the District Court, that L should make or pay over to P also a 1/3 share of such property as she had received or should hereafter receive under such decree. **Ma Bu Lone v. Ma Mya Sin**, 14 Bur. L. R. 9

Fox, C. J. and HARTNOLL, J.

(2) Object of granting Letters of Administration—Right of younger daughter of deceased Burman Buddhist to Letters of Administration during the life-time of the mother—Agreement of parties, whether can change personal law. See ACT V of 1881 (PROBATE AND ADMINISTRATION), No. 4, 4 L. B. R. 287.

(3) Ownership of property by married couples—Devolution—Letters of Administration whether and when can be granted to any person other than survivor of married couple—Proper person to administer estate. See ACT V of 1881 (PROBATE AND ADMINISTRATION), No. 1, 4 L. B. R. 293.

—2—(Adoption).

(1) *Some probabilities in favour of alleged adoption—One or two important probabilities against it—Adoption not generally published and not notorious—Valid adoption according to requirements of Burmese Buddhist Law, whether proved.*

The plaintiff, an adult, claimed to have been adopted by his uncle. He was able to adduce, from the relationship between himself and his uncle, from the latter's circumstances, from his uncle's public letters, through witnesses, and from other sources, a good deal of evidence calculated to render his contention probable and successful. It appeared, however, that the plaintiff, when called upon to state his father's name, gave, not his adoptive, but his natural father's name, thus making it doubtful, whether the idea of giving up all his prospective rights in his natural parents' property, as the result of the adoption, presented itself to his mind at the time of the alleged adoption, and, also, that his relationship with his uncle was not published generally and was not notorious, as it ought to have been, had it been true.

Held, that he failed to prove that he had been validly adopted according to the requirements of the Burmese Buddhist Law.

In the absence of anything to show what is necessary to constitute the adoption of an

Buddhist Law—(Continued).**—2—(Adoption)—(Concluded).**

adult, the general principle is that an adult cannot be adopted without his or her consent. But, as an adult (cannot be deprived of any rights without his or her consent),—an adoption depriving rights of inheritance in natural parents' property—it must appear that he or she consented to renounce all his or her prospective rights in his or her natural parents' property.

Per Fox, C. J.—Notoriety amongst the people with whom the parties ordinarily mixed in social life is what is required in evidence of the adoption of an adult (a).

Per Hartnoll, J.—When a person claims a share in an estate on the ground that he was adopted as an adult, the burden of proof lies heavily on him, the more especially as such an adoption is not usual even if it is sanctioned by the *Dhammathat*s. **Ma Gyi v. Maung Po Tha**, 14 Bur. L. R. 15

Fox, C. J. and HARTNOLL, J.

References.—(a) 11 Bur. L. R. 240 = 2 L. B. R. 224, F. 1 Ch. T. L. C. p. 168, R.

(2) *Evidence of adoption—Adoption taking place long ago—Variation in evidence as to time of adoption, effect of.*

A suit was instituted for a declaration that the plaintiff was, equally with the defendant, the *keittima* daughter of a Burmese lady and, as such, entitled to share in the latter's estate equally with the defendant. The Court of first instance gave a decree to the plaintiff. The Chief Court reversed this decree on the ground, that the evidence adduced by plaintiff as to the time and manner of the alleged adoption varied widely and the publicity of the adoption was proved. On appeal, the Privy Council observed that neither ceremony nor written document being required to constitute, or initiate the relation of, *keittima* adoption, there must be, on the one hand the consent of the natural parents and, on the other, the taking of the child by the adoptive parent with the intention and on the footing that the child shall inherit. On weighing the evidence their Lordships found that the *keittima* adoption had been proved and that, as the adoption took place long ago, the variation in the evidence as to the time of adoption was not very material. **Ma Me Gale v. Ma Sayi**, 32 C. 219 (P. C.) = 4 L. B. R. 172.

LORD DAVEY, LORD ROBERTSON AND SIR ARTHUR WILSON.

Buddhist Law—(Continued).**—3.—(Divorce).**

- (1) *Child of divorced couple—Rights of inheritance—Maintenance or renewal of filial relations sufficient to entitle plaintiffs to inherit property acquired during second marriage.*

There seems to be a great weight of authority in favour of the proposition that a child of a divorced couple is entitled to inherit from the parent, with which he or she lives, and is generally not entitled to inherit from the other parent, (when that other parent has married again and has children by the second spouse) property acquired during the second marriage, and that visiting the other parent and receiving presents or even maintenance from him does not constitute a continuance or resumption of filial relations, such as would entitle the child to inherit such property (a).

The fact that the divorced wife and the children received nothing at the time of divorce makes no difference, at any rate so long as it was not alleged that there was any property to divide. **Ma Paw v. Ma Mon**, 11 Bur L R. 236—4 L.B.R. 272.

IRWIN, O. C., AND ORMOND, J.

References —(a) B.S.J. 184, B.S.J. 296, P. J.L.B. 469; U.B.R. (1897-01), p. 116, 1 L.B.R. 161, F; P.J.L.B. 299, Diss, 2 L.B.R. 85, R.

—4.—(Ecclesiastical)

- (1) *Civil Court whether can give effect to an order of the Thathanabaing or of any other ecclesiastical authority until such order is confirmed by a judgment and decree of the Civil Court.*

A Civil Court cannot give effect to an order of the *Thathanabaing* or of any other ecclesiastical authority until such order is confirmed by a judgment and decree of the Civil Court.

The decision of the *Taungbyin Sayadan* cannot be treated as if it were a judgment and decree of a Civil Court, and it cannot be executed without even giving the other party an opportunity of showing cause against its execution.

So far as the Civil Courts are concerned, the Sanad is merely an authoritative declaration that for the time being the *Taunggyin Sayadan* is the ecclesiastical who has supreme control as *Thathanabaing*. **Shin Kuthala v. Shin Sanda**, U. B. R. (1908), 2nd Quarter, Buddhist Law (Ecclesiastical), 1.

TWOMEY, J.

Buddhist Law—(Continued).**—5.—(Inheritance).**

- (1) *Eldes daughter's share in property, inherited by her mother from her mother.**

A female Burmese Buddhist inherited some property from her mother. She died leaving a husband and five daughters. *Held*, that the eldest of the daughters was entitled to succeed to one-fourth share of the property. **Tha Tu v. Maung Bya**, 4 L. B. R. 181.

HARTNOLL, J.

References. —3 L.B.R. 8, 2 L.B.R. 255, R.

- (2) *Share of child of deceased first wife in property inherited during second marriage.*

A Burman Buddhist had a child by his first wife. After the death of the first wife, he contracted a second marriage, and by the second wife he had another child. During the continuance of the second marriage, he had inherited certain property from his mother. His second wife pre-deceased him. He died last, leaving him surviving the two children one by his deceased first wife, and the other by his deceased second wife. *Held*, the two children were entitled each to a moiety in the property inherited by the deceased from his mother. **Maung Gale v. Maung Bya**, 4 L.B.R. 189.

HARTNOLL, J.

References —S. J. L. B. 110, 177, 223 and 255; P. J. L. B. 361 and 418, R.

- (3) *Property inherited by husband during marriage—Interest of widow—widow share in the joint property.*

In property inherited by a Burman Buddhist during his marriage, the interest which his widow takes, when children of the marriage survive their father, is the same as her interest in her deceased husband's share of the property jointly owned by him and her, i. e., a life estate with a power of sale in case of necessity. **Ma Nyo v. Ma Yauk**, 4 L. B. R. 256.

FOX, C. J. and HARTNOLL, J.

References. —2 Chan. Toon's L. C. 95; 2 Chan. Toon's L. C. 77; S. J. L. B. 378, S. J. L. B. 108, and 4 L. B. R. 189, R.

- (4)—See **BUDDHIST LAW (GENERAL)**.

6.—(Marriage).

- (1) *Right of wife to mortgage her interest in joint property without her husband's consent.*

Buddhist Law—(Continued).**6.—Marriage—(Concluded)**

The texts declaring that the husband is lord of the wife must be construed in the present day in a strictly limited sense. Practically in respect of their respective rights to property, the Burman Buddhist husband and wife occupy a position of equality.

It is settled Law that the husband is not at liberty to alienate joint property without his wife's consent, but that he can make a valid transfer of his share and interest in such property. The same rules apply to the case of alienations by the wife.

Thus, where a wife mortgaged her interest in a house and land which was *linapazon letetpu* a without the consent of her husband, it was held, that the mortgage was valid **Nga San Ya v. Nga San Ya**, U.B.R. (1907), Fourth Quarter, Buddhist Law—Marriage—Joint Property, 1.

SHAW, J. C.

References.—3 L. B. R. 66, U.B.R. (1892-96) II, 45, 204. U.B.R. (1902-03), II, Ex. of decree 1, U.B.R. (1904-06), Buddh. Law—Divorce, 1, R.

(2) Acquisition of property during marriage—Right of widow to dispose of her share of property after death of husband—Property partitioned between widow and her son.

Certain property was acquired during the marriage of M. S. and M. B. On M. S.'s death, M. B. had an absolute right to dispose of her share in the property. The property was partitioned between her, and her son. What she obtained came to her in her right of widow. Consequently she could dispose of the property without the consent of her grandson. **Maung Po U v. Ma Ba Li**, 14 Bur. L. R. 57.

FOX, C.J.

(3) Child of divorced couple—Rights of inheritance—Maintenance or renewal of filial relations sufficient to entitle children to inherit property acquired by the couple during second marriage. See **Buddhist Law (Divorce)**, No. 1, 14 Bur. L. R. 236

—(7)—(Pre-emption).

(1) Right of pre-emption—Right of widow to dispose of family property subject to child's right of pre-emption.

A Buddhist widow has a right of absolute disposal in respect of her own share, after her husband's death, and a life-interest in the remainder. This decision does not overrule

Buddhist Law—(Continued).**(7)—(Pre-emption)—(Concluded).**

the law relating to the right of pre-emption but is subject to the general rule, regarding the right of all co-sharers to pre-emption.

Where a mother after the father's death sold her right over joint family property to a stranger, *held*, the son has a right of pre-emption over the whole property. **Mo Thi v. Tha Kwe**, 4 L.B.R. 128—14 Bur. L. R. 205.

HARTNOLL, J.

References.—S J.L.B. 378; P.J.L.B. 65; 2 L.B.R. 167, *li*.

Building.

—on another's land—Acquiescence—Estoppel. See **LANDLORD AND TENANT**, No. 28. A. W. N. (1908), 282.

Bundle and Encumbered Estates Act.

See **ACT 1 of 1903** (N. W. P.)

Burden of Proof.

(1) Mortgage bond—Denial of execution and passing of consideration by third party.

If an action to enforce a mortgage security is contested by the mortgagor and execution is admitted by or proved against him, the *onus* lies upon him to prove that the recitals as to the payment of consideration for the deed which he executed are untrue. When it is contested by a stranger, who denies that the bond was executed and also asserts that there was no consideration for the mortgage, the *onus* is upon the mortgagee to prove his case. **Bishesar Daya v. Harbans Sahay**, 6 C.L.J. 659—3 M L T. 38.

BRIET and MOOREHEAD, JJ.

References.—6 C. 268, 17 A. 428, 5 C.W.N. 403, 5 C.L.J. 653 (658), *R*; 3 C.W.N. CCCXXIV. *Diss.*

(2) Suit by a reversioner to restrain alienation of occupancy rights—Custom—Punjab Tenancy Act (1887), S. 59.

Where a collateral seeks to restrain an alienation of an occupancy right by an occupancy tenant, the initial *onus* lies on the plaintiff; but when he has proved his reversionary right, and his right to bring such a suit in the case of any other proprietary right, the *onus* will be shifted to the other side; and the person who asserts that no such custom obtained as to occupancy right has to prove his contention (a). **Abdullah v. Allah Dad**, 98 P. R. 1907 (F.B.)=62 P. W.R. 1907=18 P.L.R. 1908.

CLARK, C.J., CHATTERJI and ROBERTSON, JJ.

Burden of Proof—(Continued).

References.—(a) 115 P. R. 1901; 12 P. R. 1904; 891 P. R. 1898 (F. B.), R.

(3) *Ejectment, suit for—Nijjote land, suit for possession of—Makarraridar—Occupancy raiyat, plea of.*

In a suit for ejectment from *nijjote* lands, where the defence set up a right of occupancy, when the plaintiff was admitted to be a *makarraridar* of the landlord, it lies upon the defendants to make out that they are occupancy raiyats and are entitled to remain there **Barak Kamal Sahai v. Lilhu Christian**, 8 C.L.J. 170.

CASPERSZ and SHARFUDIN, JJ.

References.—9 C.W.N. 144 and 7 C.L.J. 553, R. 3 C.W.N. 763, *et pl.*

(1) *Bill of exchange or promissory note exhibiting the appearance of alteration—Whether the onus lies on the person suing to account for it—Whether in other documents the alteration is presumed to have been made before execution.*

If a bill of exchange or promissory note exhibit the appearance of alteration, the onus lies on the person suing to account for it, but in other documents (except wills) the alteration is presumed to have been made before execution. **Raja Shewbux Bogla v. Ma Ma Gyi**, 14 Bur. L. R. 213.

ORMOND, J.

(1-a) Suit for ejectment—Defence setting up a tenure by right of purchase from former tenant—Plaintiff proving that he is owner of land—Defendant to make out that he is tenureholder and he is entitled to remain thereon—See **EJECTMENT**, No. 2, 7 C. L. J. 553.

(1-b) Suit for declaration of title by person whose objections to execution have been disallowed—Burden of proof. See **CIV. PRO. CODE**, No. 190, A. W. N. (1908), 125.

(5) Claim to attached property—Fictitious sale—Possession at date of attachment—See **CIV. PRO. CODE**, No. 189, 4 L. B. R. 228.

(6) Sale of property to defeat creditor's claim—Good faith of purchaser—Consideration—Burden lies on purchaser—See **FRAUDULENT TRANSFER**, No. 1, 4 L. B. R. 211.

(7) Sale of ancestral land to pay off debt really due—Onus of proving immoral nature of the debts—See **CUSTOMS (PUNJAB) (ALIENATION)**, No. 1, 55 P. R. 1908.

Burden of Proof—(Continued).

(8) Suit for declaration of invalidity of alleged adoption—Right to immediate possession obstructed by intervention of widow's estate—Burden of proof that adoption was invalid or never took place on plaintiff—See **HINDU LAW (ADOPTION)**, No. 3, A. W. N. (1908), 79.

(9) Will of illiterate person—Proof of knowledge of contents of the will lies on person propounding the will—See **WILL**, No. 2, 11 O. C. 20.

(10) Property alleged to be self-acquisition by one party and contended to be joint property by the other—Existence of ancestral property—Presumption—See **HINDU LAW (SELF-ACQUISITION)**, No. 1, 3 M. L. T. 314.

(11) Joint family property—Presumption arising out of part being admitted to be ancestral—Onus of proving self-acquisition—See **HINDU LAW (JOINT FAMILY)**, No. 4, 10 Bom. L. R. 184.

(12) Joint Hindu family—Liability of sons for father's debts—Defence of sons that debts were incurred for immoral purposes—Burden of proof on sons and not on creditors—See **HINDU LAW (DEBTS)**, No. 1, A. W. N. (1908), 61.

(13)—Where person claims title under conveyance from Hindu Woman, with her usual limited interest, and seeks to enforce that title against reversioners See **HINDU LAW (WOMAN'S ESTATE)**, No. 1, 12 C. W. N. 393.

(14) Fraudulent transfer of property—Fraudulent intention not carried out—Suit to recover such property—Conditions for recovery—Burden of proof—See **TRANSFER**, No. 1, 4 N. L. R. 26.

(15)—Lies heavily on person setting up adoption of adult, which is not usual—See **BUDDHIST LAW (ADOPTION)**, No. 1, 14 Bur. L. R. 15.

(16)—Apportionment of compensation—Rights of Zemindar—Onus of proof as to the value of a particular contingency to Zemindar on whom lies. See **COMPENSATION**, No. 1, 7 C. C. L. J. 284.

(17) Burden of proof regarding alleged custom, among Chuna Jats of Deska Tahsil of Sailkot, that adopted son can succeed collaterally in his adoptive father's family.—See **CUSTOM INHERITANCE AND SUCCESSION**, No. 1567 P.L.R. 1908.

(18)—As to custom invalidating marriage of *Rajput* with *Khatani* woman—See **HINDU LAW (MARRIAGE)**, No. 1, 64 P. L. R. 1908.

Burden of Proof—(Continued).

(19)—on whom lies in suit for damages for fraud when time of plaintiff's knowledge of fraud doubtful—See LIMITATION ACT, No. 61, 18 M. L. J. 19.

(20) Marriage by Mahomedan with a fifth wife when four previous wives are living—Children born of such marriage—Burden of proving Legitimacy—See MAHOMEDAN LAW (MARRIAGE), No. 1, 6 P. R. 1908.

(21)—in suit under S. 288, C. P. C., where objection under S. 278, C. P. C., was disallowed and objector instituted suit, lies on plaintiff—See CIV. PRO. CODE, No. 191, 5 A. L. J. 358.

(22) Party on whom—lies, to succeed, must establish *prima facie* case—Weakness of adversary's case not to be taken advantage of—See TRANSFER OF PROPERTY ACT, No. 14, 7 C. L. J. 586.

(23) Mortgage and sale of ancestral property—Burden of proof in either case as to validity of alienation against the interest of other members in the family property—See HINDU LAW (ALIENATION), No. 7, 23 T. L. R. 8.

(24) Bailment—Engaging for repair the driving beam of a sewing machine to copper-smith—Degree of care—Burden of proof—See CONTRACT ACT, No. 32, U. B. R. (1908), 1st Quarter, Contract, p. 11.

(25) Suit for redemption of mortgage of 1846—Plaintiff to give at least *prima facie* proof that mortgage is redeemable. See MORTGAGE (REDEMPTION), No. 20, 11 O. C. 285.

(26)—where Reg. III of 1891, applied to any lands confiscating proprietary rights and giving compensation—Government must prove that statute applies. See REG. III of 1891, No. 1, 12 C. W. N. 1095.

(27) Persons setting up custom opposed to personal law must prove that custom. See CUSTOM (PUNJAB) INHERITANCE AND SUCCESSION, No. 21, 86 P. R. 1908.

(28)—on certain issue wrongly placed on party—Material irregularity committed within S. 70 (a) of Act XVIII of 1884. See ACT XVIII of 1884 (PUNJAB COURTS), No. 6, 143 P. W. R. 1908.

(29) Suit for damages by legal representative of deceased person killed by accident while travelling in Railway—Negligence—Burden of proof. See EVIDENCE ACT, Nos 28, 4 M. L. J. 251.

Burden of Proof—(Concluded).

(30) Acquisitions out of the income of widow's estate—Intention of widow to treat it as separate property or as an accretion to estate—Power of alienation—*Bona fide* purchaser for value—Burden of proof. See HINDU LAW (WIDOW), No. 11, O. C. 810.

(31)—in cases of insanity—General rules of estimating evidence as to insanity. See LUNACY, No. 1, 10 Bom. L. R. 1004.

(32)—See PRE-EMPTION No. 34, 5 A. L. J. 752.

(33) Suit for ejectment alleging that defendants are merely tenants at will—Burden of proof on defendants to show permanent interest. See EJECTMENT, No. 5, 8 C. L. J. 513.

Burma.

Applicability of Transfer of Property Act to—See MORTGAGE (REDEMPTION), No. 6, U. B. R. (1907), 3rd Quarter, Mortgage, 1.

Burma Lands Act.

SEE ACT XIII OF 1898.

Burmese Law—See BUDDHIST LAW.

Cancellation of deed.

(1) *Equity—Conditions under which it will grant relief against deeds deliberately executed.*

A Court of Equity will not grant relief and set aside deeds (release deeds, for instance,) executed by a person, where the proceedings were entirely started by him and deliberately carried through by executing and registering several deeds and by delivering possession, whereby he secured a provision of maintenance for himself, to which he would not otherwise be entitled. **Bhagat Ram v. Gokal Chaud**, 150 P. R. 1908.

KENSINGTON & LAL CHAND, JJ.

Reference —23 C. 15 (P. C), R.

Cantonment,

—in Native State—Power of commanding officer to grant land—See NATIVE STATES, No. 1, 12 C. W. N. 465.

Carriers.

(1) *Liability of, for negligence and damage to goods—Bill of lading—Provision as to exemption from liability, effect of—English, American and Indian Law—Contracting against liability—Public policy—Contract Act, Ss. 23 and 151.*

Carriers—(Continued.)

The goods (rice bags) belonging to the plaintiff were shipped in a steamer belonging to the defendant company, for delivery to the plaintiff's agent at another port, and, on arrival at that port, were placed by the company on the foreshore, where, however, they were destroyed under the orders of the Municipal authorities, on the ground that they had become damaged by rain and unfit for consumption.

The condition in the Bill of lading ran thus:—"In all cases and under all circumstances, the liability of the Company shall absolutely cease, when the goods are free of ship's tackle, and, thereupon, the goods shall be, for all purposes and in every respect, at the risk of the shipper or consignee."

In a suit by the plaintiff for recovery of the value of the rice so damaged,

Held, per White, C. J., and Sankaran Nair, J.—The contract was not terminated by the deposit of the goods on the foreshore, and it was for the defendants to show that the plaintiff's goods were ready for delivery at the time they were damaged, and not for plaintiffs to show they were not ready; and as there is no evidence to show that the bags were ever ready for delivery by being separated from the rest, the defendants were negligent (a).

Per Wallis, J.—The plaintiffs' claim is not so much for non-delivery of the bags as for failure to deliver them in good order and condition, and the plaintiffs failed to prove that the condition of the bags, when put at their disposal, justified them in refusing to take delivery.

Held also, per White, C. J. and Sankaran Nair, J. (Wallis, J., contra)—A ship-owner is not exempted from liability for negligence, unless the contract which exempts him is both clear and express; and as the contract in this case, though clear, is not express, the defendant are not protected by their bill of lading (b).

Per White, C. J., and Wallis, J.—The law of the United States of America forbids a carrier to exempt himself by contract from liability for negligence, while the law of England does not. On a question of this character the Courts in India ought to follow the law of England (c).

Per Sankaran Nair, J.—The question of liability is not concluded by authority in India. A rule of English Common Law ought not to be followed, when it is opposed to the principles followed and acted upon by the Indian Legislature. A contract exempting a ship-owner from liability for the negligence of himself or his

Carriers—(Continued.)

servants in not taking the care required by S. 151, Contract Act, is contrary to public policy and, therefore, void under S. 28 of that Act. Such an exemption clause is clearly against the interests of the mercantile community and not necessary in the interests of the shipowners.

The reasons of the English and American rules on the subject considered. **K. Y. S. Sheikh Mahamad Ravuthar v The British India Steam Navigation Co. Ltd.**, 4 M. L. T. 110 (F B).

WHITE, C. J., and WALLIS and SANKARAN NAIR, JJ.

References—(a) The Glendaroch (1894), p. 236, D (b) (1895) 2 Q. B. 301; 22 B. 184, R. 1 K. B. 750, Expi and F. 2 K. B. 378; 1 K. B. 769, (1904) P. 286, 1 Q. B. 619; 26 L. T. 704, doubted. (c) 10 C. 489, 28 M. 400, R.

(2) *Perishable goods shipped—Destruction of decayed goods at port by order of Municipal authorities—Obliteration of marks—Portion of goods not identified—Rest delivered—Claim for short delivery—Negligence—Liability of carrying steamship Company.*

In July 1907, 2,035 baskets of onions were shipped from Madras to Moulmein by the B.I. S.N. Co. They travelled to Rangoon by a certain steamship and were there transhipped to two other steamships and conveyed to Moulmein in three different voyages. Three of the consignees of these onions were A, R, and P, and to them were consigned 100, 100 and 150 baskets respectively. A, pleaded that he only received 70 baskets, and so he sued the Company for short delivery of 30 baskets. Under similar circumstances, R and P respectively sued the Company for short delivery of 25 and 54 baskets. The Company denied their liability by reason of the clauses of their bills of lading, and they especially relied on the endorsement on the bills. "Onion bags and baskets frail. Carried at shippers' risk. Steamer not responsible for condition or outturn of contents." On the merits of the case, they pleaded that the 2,035 baskets were shipped to 17 consignees in Moulmein and arrived in Rangoon on the 21st July (a Sunday, when no transshipment is done), and that the consignment was reshipped to Moulmein as per account stated by them. The Company stated that, by order of the Municipality, 176 baskets and 11 bags, containing 50 baskets, were destroyed in Moulmein, owing to the deterioration of their contents and that, after delivery, 32 baskets still remained in the godown, and they urged that, owing to the baskets being

Carriers—(Continued).

frail and their contents having become bad and the consequent obliteration and destruction of all marks, it was impossible to say to whom any portion of the 258 baskets were consigned. The plaintiffs A, E, and F were invited to bear a rateable proportion of the loss. The plaintiffs had also been offered a portion of the 32 baskets in the godown, which they refused to accept, with the result that, on the 30th August, the whole 32 baskets were destroyed as rotten. These baskets bore no marks. The plaintiffs did not urge that the onions had been damaged owing to the negligence of the defendant Company, but contended that the defendant Company had to show what had become of each cargo consigned to them. The Company, however, did account for the whole 2,095 baskets consigned to them.

Held that, having regard to the perishable nature of the goods, the frail packing, and the terms on which the Company undertook to carry, in the absence of any proof of negligence on the part of the carriers the Company could not be held liable for all the baskets destroyed by order of the Municipality and that the loss should fall on the owners of the goods, and that with respect to the baskets bearing no marks and, hence, undelivered, the several owners of the consignments became tenants in common of the baskets in proportion to the quantities which should have been delivered to them respectively, and the plaintiffs, who refused to take shares though offered, could not hold the defendant Company responsible. **The British India Steam Navigation Company Ltd. v. A H Dadabhoy**, 4 L B R. 334 = Bur. L.R. 299.

HARTNOLL, J

References —L.R. 3 C.P. 427, and L R.A.C. (1894) 494, 505 and 507, *F*.

(2-a) *Nature of obligation of common carriers—Origin of the liability—Implied agreements by carrier by water—Burma Laws Act (XIII of 1898), S. 13—Law administered by Calcutta High Court in Civil case to be administered by Burma Courts—Contract, Act*

The obligation imposed by Law on common carriers has nothing to do with contract in its origin, but it is a duty cast upon common carriers by reason of their exercising a public employment for reward, and a breach of such duty is a breach of the Law and for this breach

Carriers—(Continued).

an action lies, founded on the Common Law, which action wants not the aid of a contract to support it. *Held*, that the Common Law liability of a carrier in the position of the defendant rests on the same foundation as the liability of a common carrier.

Held that a carrier by water impliedly engages that his vessel shall be water-tight. *Held*, also that, under Sub-S. (2) of S. 13 of the Burma Laws Act, all questions arising in civil cases in the Courts of Rangoon shall be dealt with and determined according to the Law for the time being administered by the High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original civil jurisdiction, that the common Law of England is part of the law administered by such Court in cases which arise in Calcutta; that if such Common Law would be applied in a case of the same description as the present arising in Calcutta, it should be applied by this Court to the present case. **Maladi Sathalingam v. Ramjam Lalju Sajai**, 14 Bur. L. R. 77.

FOX, C. J. & IRWIN, J.

References —18 C. 620, *F*, East 428, *cited*, 1 C. P. D 423, *F*, No. 1X of 1872, No. XIII of 1898.

(3) *Liability of—*. See Act IX of 1890 (RAILWAYS) No. 2, 113 P R 1908.

Carriers Act.

See Act III of 1865

Catalogue.

—, illustrations in, copy-right in. See Copy-Right, No. 1, 12 C. W. N. 753.

Cause of action.

(1) *Suit for a share in inheritance—Dower, Subsequent claim for—Cur. Pro. Code, S. 13, Explanation II and S. 43.*

Held, that the cause of action for a claim for dower is distinct from the cause of action for a share in the inheritance.

Held, further, that there is no legal obligation, to include a claim for dower in a suit for inheritance (a) **Kisar Begam v. Nizam Ahmad**, 11 O.C. 69.

EVANS and GRIFFIN, J. CS.

References —(a) 21 C. 157, 20 A. 81, *D*.

(2) *Entry of defendant's name in 1895 in revenue papers—Application for correction of such papers—Denial of plaintiff's title and assertion of his own by defendant—Refusal to have the entry corrected—When cause of action*

Cause of Action—(Concluded).

for declaratory suit arose. See LIMITATION ACT, No. 9, 5 A.L.J. 637.

(3) Suit for possession—Failure of—Decree to be made—See POSSESSION, No. 1, 7 C. L. J. 44.

(4) See RES JUDICATA, No. 1, 55 P. R. 1907 = 96 P. W. R. 1907 = 65 P. L. R. 1908.

(4-a) Claim for damages for improper search by a judicial officer as such—No cause of action against the Secretary of State for India—Addition or substitution of defendant—Civ. Pro. Code, S. 32—See ACT XVIII OF 1850 (PROTECTION OF JUDICIAL OFFICERS) No. 1, 59 P. W. R. 1908.

(5) Several breaches of covenant made under one contract—Maintainability of separate suits for each breach—Effect of agreement to bring separate suits—See CIV. PRO. CODE, No. 61, 28 P. R. 1907 = 93 P. L. R. 1908.

(6) First suit by partner for declaration of his right to partnership property and for partition of same standing in name of one partner only—First suit withdrawn—Second suit for partition of property standing in joint name of both partners not included in first suit—Cause of action in both suits identical—See CIV. PRO. CODE, No. 65, 5 A.L.J. 278.

(7)—arises only where money is made, expressly or impliedly, payable by the parties under their contract—General rule of law as to payment has no application—See CIV. PRO. CODE, No. 41, 31 M. 223.

Cess Act.

See ACT IX OF 1880 (BENGAL).

Cesses.

Liability of babuana property for cesses—See BABUANA GRANT, No. 5, 13 C.W.N. 118.

Chakran Land.

(1) *Resumption and transfer to Zemindar—Recovery of same by putnidar—Suit for specific performance, if necessary.*

Where *chakran* lands were included in the *putni potta* granted by the Zemindars to the plaintiffs before the resumption thereof under the Chowkidari Act.

Held—That, upon resumption and transfer of the lands to the Zemindars, the remedy of the putnidars was to bring a suit for recovery of possession, and not a suit for specific performance of a contract (a). **Kumar Bunwari Mukunda Deb Bahadur v. Bindhu Sundar Thakur**, 12 C.W.N. 459 = 7 C.L.J. 489 = 35 C. 346.

• MACLEAN, C. J., and COXE, J.

Chakran Land—(Concluded).

References:—(a) 34 C. 564, not followed, 11 C. W.N. 201 = 34 C. 108 and 4 C.W.N. 814, referred to.

(2) *Chowkidari—Putni, construction—Zemindar—Putnidar—Lands held by Chowkidar, revert to whom, on resumption.*

In the absence of a contract to the contrary, the Zemindar, who appoints and dismisses chowkidars and is in enjoyment of their services since the creation of the *putni* lease, is entitled to the lands held by the chowkidars after the resumption of such lands by the Government (a). **Nitya Nund Hazra v. Maharajadhiraj Bejoy Chand Mohatab**, 7 C.L.J. 593.

RAMPINI and SHARFUDDIN, JJ. •

Reference —(a) 5 C.L.J. 28, D

(3) Suit for partial partition of chowkidari—of portion of estate, whether maintainable—See PARTITION, No. 1, 12 C.W.N. 640.

(4) Reg XX of 1817—Whether an entry in Chowkidari register is made in discharge of official duty and in the ordinary course of business. See EVIDENCE ACT, No. 9, 13 C.W.N. 71.

(5) Chowkidari *chakran* land—*putni*, construction—Zemindar appointing chowkidars and enjoying their services.—Putnidar—Lands held by Chowkidar revert to whom, on resumption by Government—See CHAKRAN LAND, No. 2, 7 C.L.J. 593.

Champterty.

Agreements whether voidable in India for champterty—See HINDU LAW (WOMAN'S ESTATE), No. 1, 12 C.W.N. 393.

Charge.

(1) Document creating an equitable—Only stamped with stamp required for power of attorney—not registered according to provisions of Registration Act—Immovable property not affected—See REGISTRATION ACT, No. 12, 7 C.L.J. 149.

(2),—and mortgage, difference between—See COMPROMISE, No. 2, 7 C.L.J. 492

(3) Document showing intention to make land security for payment of money mentioned in it creates a—See CONSTRUCTION (OF DEEDS), No. 2, 10 Bom. L.R. 575.

(4) Ss. 59, 100, Act IV of 1882—No charge created under S. 100 if instrument invalid as mortgage for want of attestation. See TRANSFER OF PROPERTY ACT, No. 32, 31 M. 337.

Charitable trust.

—Not void for vagueness—Parties—Persons interested not being upon the record—Effect—See **ENDOWMENT**, No. 1, 5 A.L.J. 29.

Charity.

—by a Parsi donor—Applicability of Cyprus doctrine—See **CYPRUS DOCTRINE**, No. 1, 9 Bom. L.R. 1203.

Charter Act.

(1) *S. 15—Order of remand—Judgment—Civil Procedure Code (Act XIV of 1882), 8.584—Second appeal—Ground.*

A judgment of a Judge of the High Court sitting singly and remanding a case after dealing with the whole case and setting aside the judgment and the decree of the lower Court is a judgment within the meaning of S. 15 of the Charter Act

A question as to the weight which the lower Appellate Court should have given to certain documents, or that the lower Appellate Court misunderstood the result of the first Court's local investigation, is no ground of second appeal. **Rai Benode Behari Bose v. Rai Pasupati Nath Bose**, 13 C.W.N. 105

RAMPINI, C. J. & MITRA, J.

(2) *S. 15—Power of High Court to interfere with order of Subordinate Courts passed without jurisdiction—See COMMISSION*, No. 1, 3 M.L.T. 246.

(3) *S. 15, scope of—Powers of High Court to stay criminal proceedings ordered by Civil Courts—See HIGH COURT*, No. 1, 4 M.L.T. 186

(4) *S. 15—Whether S. 15 empowers High Court to interfere where District Judge initiates criminal proceedings under S. 476, Crim. Pro. Code—Conditions under which revisional jurisdiction should be exercised by High Court. See CRIM. PRO. CODE*, No. 7, 35 C. 909.

Chose-in-action.

(1) Assignee of negotiable instrument as assignee of chose-in-action—Transfer of Property Act, ss. 130 and 137—See **PROMISSORY NOTE**, No. 2, 17 M.L.J. 393.

Chota Nagpore Encumbered Estates Act.

See **ACT VI OF 1876 (BENGAL)**.

Chota Nagpore Landlord and Tenant Procedure Act.

See **ACT I OF 1879 (BENGAL)**.

Chowkidar—See CHAKRAN LAND.**Chowkidari Act.**

See **ACT VI OF 1870 (BENGAL)**.

Civil Courts Act.

(1) See **ACT XIV OF 1869, AMENDED BY ACT I OF 1900 (BOMBAY)**.

(2) See **ACT IV OF 1901 (ORDH)**.

Civil Procedure Code.

(1) *S. 2—Decree—Settled accounts, order directing re-opening of—Attorney and client—Settlement of untaxed bills, when liable to be re-opened—Fiduciary relationship—Omnis of showing good faith—Indian Contract Act (IX of 1872), S. 16—Evidence Act (I of 1872), S. 111—Independent advice, opportunity to obtain—Promissory note, assignment of, without endorsement.*

Plaintiff, a solicitor, had advanced various sums of money to a client from time to time on a mortgage bond and three further charges. The consideration for the third further charge was not paid in cash, but was made up of (1) amounts due to the plaintiff on several promissory notes in the plaintiff's favour, (2) certain promissory notes executed by the client in favour of a third party, which the plaintiff is said to have "taken up," (3) balance of amount due as interest on the mortgage and two further charges, and (4) a certain amount stated to have been found due to the plaintiff as costs for acting for him in various suits, upon a settlement made of amounts due under various taxed and untaxed bills, a large remission having been allowed in consideration of all the bills not being taxed.

In a suit by the plaintiff against the heirs of the deceased client to realize the amounts due on the mortgage and the three further charges the plaintiff obtained a decree on the first three bonds, but the 4th bond was ordered to be re-opened, and it was directed that the plaintiff "do get all his bills of costs up to the 3rd August, 1903 taxed by the Taxing Officer of the High Court, and then re-file the bills in this Court, that then a Commissioner be appointed to take accounts in the light of the observations in this case that after the Commissioner's report is received and the parties are heard thereon, final decree will be drawn up under S. 89 of the Transfer of Property Act."

Held, that this order was a decree. The fact that the subordinate Judge intended hereafter to adjust the equities arising out of the contract, did not in any way do away with his adjudication that the contract, as it stood, was not binding on the defendants (a).

As between attorney and client, the existence of fiduciary relationship alone, or the fact that

Civil Procedure Code—(Continued).

certain bills of costs were not taxed but were settled out of Court by execution of a deed, will not justify a Court in re-opening accounts settled on which the bond is based, unless sufficient grounds of suspicion exist, or the bills are *prima facie* shown to be extortionate (b).

Section 16 of the Contract Act only presumes undue influence by a person in a position to dominate the will of another, when the contract appears on the face of it to be unconscionable.

To prove "good faith" of a transaction in which one party stands in a fiduciary relationship to the other, it is certainly not necessary to prove that all the accounts on which the contract is based are correct.

Under the practice obtaining in the original side of the High Court, taxation of bills of solicitors is deemed to be optional with the client and bills of costs are not infrequently adjusted without taxation.

The case of *Monohur Doss v Romanath Law* (I.L.R. 3 C. (473) was decided on the special circumstances of that case and does not lay down any general rule of law

An attorney may be bound under certain circumstances to advise his client to take independent advice. It is not his business to see that the attorney selected by his client fulfills his duties to his client and is not guilty of any remissness or negligence. If he sends his client to another attorney and is ready to comply with all reasonable demands for information, he cannot be expected to do more, or to be responsible for another's omissions.

If the parties to a promissory note agree that on the promisor executing a bond for the amount due in favour of a third person, the promisee would cancel the note, this arrangement would be a perfectly valid contract, whether the third party paid any money to the promisee or not.

Although a negotiable instrument can only be assigned by endorsement, that does not prevent any arrangement not to negotiate the note but to put an end to it. **Shamuldhone Dutt v. Srimutty Susila Bala Debi**, 12 C.W.N. 1102.

COXE and DOSS, JJ.

References :—(a) 9 B. 183, D and doubled, 15 B. 155=18 I.A. 6, R; (b) 1 Ch. 73, F, 1 Drury and Warran 567, D and *Expt.*

(1-a) S. 2—Order on an application under S. 19, Arbitration Act, 1899, a decree. See ACT IX OF 1899 (ARBITRATION), No. 1-a, 144 P. R. 1908.

Civil Procedure Code—(Continued).

(2) Ss. 2, 103, 556, 558, 584 and 588—*Dismissal of appeal, or default of appearance—Judge's discretion to restore appeal—Order dismissing appeal for default whether a decree.*

An order was made before the recess adjourning an appeal to the 22nd June to fix the date of hearing. On the 22nd June the appeal was posted to the 1st July on which date it was called for hearing and, appellant not being present either in person or by pleader, was dismissed for default. *Held*, the Judge did not exercise his discretion wrongly in declining to hold that the appellant was prevented by any sufficient cause from attending when his appeal was called on. A decision, dismissing a suit under S. 102 for default of appearance of the plaintiff or dismissing an appeal under S. 556 of the Code for default of appearance by the appellant, is not a decree within the meaning of S. 2 of the Code, inasmuch as there is no 'formal' expression of an adjudication upon any right claimed or defence set up. **Dakshinamurthy Pillai v The Municipal Council of Trichinopoly by its Chairman**, 3 M L T. 336=31 M. 157.

WHITE, CJ and BRINSON, J.

References :—22 M. 221, 2 M. 75, 8 A. 354, D, 30 C 660, 16 B. 23, 9 A. 127, D

(3) Ss. 2 & 310 A—Mortgagor failing to pay money on fixed date as directed by decree for sale of mortgaged property—Loss of mortgagor's rights as decree-holder, whether deprives him of his rights as judgment-debtor—Conditions of completion of execution sale under S. 310 A—See TRANSFER OF PROPERTY ACT, No. 55, 3 M.L.T. 281.

(4) Ss 2 and 523—Agreement to refer to arbitration—Order of reference—Decree—Appeal.

Where a Court, acting under S. 523 of Civ. Pro. Code, causes an agreement to refer to arbitration to be filed and makes an order of reference, the order is a decree, within the meaning of that expression as defined in S. 2 of the Code, and is, therefore, appealable. **Narpat Rai v Devi Das**, 126 P. R. 1907=88 P. W. R. 1907=50 P. L. R. 1908.

JOHNSTONE and RATTIGAN, JJ.

References :—81 P. R. 1901(F. B.), 25 P. R. 1902 (P. C.) 27 M. 255, 29 M. 303, 33 M. 757, F; 26 A. 205, 28 A. 21, not *appr.*

(5) Ss. 2, 510 and 588 (c)—Decree—Order—Order adjudicating rights of defendants in an interpleader suit—Appeal.

Civil Procedure Code—(Continued).

The adjudication upon the claims of the defendants in an interpleader suit is a decree, and stands on the same footing as an adjudication of any other claims, and is appealable under the provisions of S. 540. The direction as to interpleading is an order and appealable under S. 588 only. **Maharaj Singh v. Chhittar Mal**, 4 A. L. J. 683=A. W. N. (1907) 270=30 A. 22.

BANERJI, J.

(5-a) Ss. 2 & 515—Order refusing to stay execution of a decree under appeal—Decree—Appeal.

An order by District Judge refusing to make an order for stay of execution of a decree under appeal, is a decree, and is therefore appealable. **Pamandas Gianchand v. Yarialdas Dhanoomal**, 2 Sind. L.R. 24.

PRATT, J. C. & CROUCH, J. C.

References —29 B. 72, Dhs & 25 B. 243, R

(6) S. 3, cl 25—Standing timber is immovable property within meaning of—under S. 3 Cl. 25 and S. 4 of General Clauses Act—See Act VIII of 1885 (BENGAL), No. 24, 7 C.L.J. 152

(7) S. 12—Court of Political Agent at Muscat—Whether established by Governor-General in Council—Jurisdiction of British Court, whether ousted by pendency of a prior suit in Muscat Court.

The Court of the Political Agent at Muscat, is a Court beyond the limits of British India, and it is not established by the Governor-General in Council. But it is established by Her Majesty's order in Council. Hence, the jurisdiction of the British Indian Court is not ousted by a prior suit pending in the Muscat Court, by reason of S. 12, C.P.C. **Rahimtullah Mukhl Ramzan v. Damodhar Dharamsi**, 1 Sind. L. R. 166.

HAYWARD, J.

(8) Ss. 12 and 13—Res judicata—Rent, suit for—Mesne profits, suit for.

A purchased a tenure at a sale for arrears of rent, and some time after, served a notice upon B, an under-tenure-holder under S. 167 of the Bengal Tenancy Act. A then sued to eject B, and to recover mesne profits. The Court made a decree for ejectment and allowed mesne profits from the date of the service of notice under S. 167. B preferred an appeal. During its pendency, A sued B for rent for the period between the date of his purchase and the date of the service of notice:

Civil Procedure Code—(Continued).

Held, (1) that the suit was not barred under S. 12 of the Civ. Pro. Code (a).

(2) that the suit was not barred under S. 13, Civ. Pro. Code, as A could not join claims for rent and mesne profits in the previous suit. **Naffar Chander Pal Chowdhury v. Munshi Mahomed Kayun**, 8 C.L.J. 303.

RAMPINI and MOOKERJEE, JJ.

Reference —(a) 7 C.W.N. 720, applied.

(9) S. 13—Res judicata—Matter directly and substantially in issue—Different causes of action—Custom—Hindu Law—Succession—Daughters—Collaterals—Sarsut Brahmans of Gopalpura Village, Amritsar District—Mortgage with possession—Duty of mortgagee to keep account of rents and profits—Interest.

A person suing for possession of land as mortgagee is not required to put forward in the suit his claim to succeed to the property as a reversioner, and his omission to do so does not prejudice his right in any way, as S. 13 of the Civ. Pro. Code is not applicable to such cases.

Held that the parties to the suit, Sarsut Brahmans of Gopalpura village of Amritsar District, though owned land for generations, were governed by Hindu Law, and not by custom, and that daughter's sons excluded near collaterals according to Hindu Law.

In a suit for redemption, the Chief Court held that interest and profits realized by the mortgagee balanced each other, where the mortgagee had failed to keep accounts of the profits realized from the mortgaged property. **Amin Chand v. Tirath Ram**, 95 P.L.R. 1908.

CHATTERJI and KENSINGTON, JJ.

(10) S. 13—Decision of a Court in British India, whether res judicata in Berar.

S. 13, C.P.C., as applied to Berar, is not the same law as it is in British India. In British India, it is Act XIV of 1882 enacted by the Governor-General in Council. In Berar it is a replica of this enactment set up by an executive order of the Government of India in the Foreign Department.

In Berar the judgment of the Nagpur Court is a foreign judgment. Hence a matter decided by a Court in Nagpur is not *res judicata* as applied to Berar. **Syed Imam v. Mohamad Shikandar**, 4 N.L.R. 61.

STANION, J.C.

Reference.—29 C. 707 (715), F.

Civil Procedure Code—(Continued).

- (11) *S. 13—Right to sue reserved by decree—Second suit not barred by first.*

In a suit by an auction purchaser for recovery of lands, the decree directed the dismissal of the suit on the ground of non-production of the sale certificate, but reserved the right of the plaintiff to bring a fresh suit on obtaining the sale-certificate. In a second suit by the plaintiff for recovery of the same property on production of the sale-certificate, *held*, the first suit did not operate as *res judicata*. **Murugappa Asari v. Santhiammal**, 18 M.L.J. 198.

WHITE, C.J., and SANKARAN NAIR, J.

- (12) *S. 13—Res judicata—Decision on a preliminary point—Appeal—Set aside—Remand for trial on other issues—Suit dismissed for default of parties.*

In a former suit for rent between the same parties the Collector on appeal held that a certain lease was inoperative and remanded the case for trial. It was then dismissed for default. *Held* in a subsequent suit for rent that the finding, although it was not embodied in the decree, operated as *res judicata* inasmuch as it was the basis of the Collector's order. **Sheikh Alam v. Paramanand**, 5 A.L.J. 48—A.W.N. (1908), 41—3 M.J. T. 205.

STANLEY, C.J., and BURKITT, J.

- (13) *S. 13—Res judicata.*

In order to establish the plea of *res judicata* the Court which decided the former suit must have been such a Court as would have been competent to try and decide not only the particular matter in issue in the subsequent suit but also the subsequent suit itself in which the issue is subsequently raised (a).

It is the competency of the original Court which decided the former suit that must be looked to and not that of the Appellate Court in which the suit was ultimately decided on appeal (b). **Shibu Rout v. Baban Rout**, 12 C.W.N. 359—7 C.L.J. 470—35 C. 353

• STEPHEN and MOOKERJEE, JJ.

References—(a) 9 C. 439 (P.C.), 11 C. 301 (P.C.), *Relied on*; 24 B. 456, 24 M. 275, 29 C. 707, Smith. L.C. Vol. II, 713, R; 5 C. 832, *not B*; (b) 28 C. 78, D; 8 M. 83, *not F*; 25 C. 571, 10 C.W.N. 529, 28 C. 415, R.

- (14) *S. 13—Res judicata—Matter directly and substantially in issue—Bengal Tenancy Act (VIII of 1885), S. 69, applicability of—Rent, deposit of—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 2 (a)—Onus—Notice,*

Civil Procedure Code—(Continued).

service of by post, presumption—Fact, question of—Order-sheet, ex parte entry in, evidentiary value of—Joint Hindu family, members of, rent due to—Co-owners, suit by some of, maintainability of—Addition of parties after limitation period—Claim joint and indivisible—Limitation Act (XV of 1877), S. 23—Abwabs—Bata usual, Dustur, Hazzatnama, Sonari, Selami, Percentage, and Batta Company.

The Court is not precluded under S. 13 of the Civil Procedure Code from trying an issue whether the rent of the holding is payable entirely in cash or partly in cash and partly in kind, as it was not directly and substantially in issue in a previous litigation between the same parties, where the substantial relief sought was a declaration that the appraisement made by the Collector under S. 69 of the Bengal Tenancy Act was invalid.

S. 69 of the Bengal Tenancy Act is applicable upon the assumption that the rent is taken by appraisement or division: the only matter in controversy between the parties is as to the quantity value or division of the produce, the section ceases to be applicable when there is a *bona fide* dispute as to the character of the holding itself (a).

If a tenant relies upon clause (a) of Art. 2 of Sch. III of the Bengal Tenancy Act, he must prove that there was an application which fulfilled the requirements of S. 61, sub-S. (2) of the Bengal Tenancy Act, and that a deposit was made under S. 61 after the arrear had fallen due, he must also show that notice under S. 63 was served on the landlord and prove the date when the service was effected.

There is no presumption that a letter, which was posted, was properly addressed, and the presumption, that the letter reached the addressee, has no application till it is established that the letter was properly addressed (b).

Before the presumption of due service can be applied, it is necessary to prove that the notice was sent in a cover which was properly addressed (c).

The presumption that a notice sent by post was duly served is not a conclusive presumption of law; it is merely a presumption of fact; and whether it arises in a particular case or not depends upon all the circumstances (d).

An *ex parte* entry in the order-sheet is by no means conclusive evidence, if it is admissible

Civil Procedure Code—(Continued).

in evidence at all, as against the landlord, who was not a party to the proceedings for deposit under S. 61 of the Bengal Tenancy Act (e).

When rent is due to the member of a joint Hindu family, it is not open to the *karta* alone to maintain a suit for rent without joining the other members either as plaintiffs or as defendants, except when the tenant has dealt with such *karta* as sole landlord (f).

When the co-owner landlords were not unwilling to join as co-plaintiffs but did so with the utmost readiness as soon as objection was taken by the tenant defendants, they should have been joined as plaintiffs in the first instance and if they are brought on the record after the expiry of the period of limitation, their claim is barred by limitation and the entire claim is barred as the claim was joint and indivisible (g).

The *batta usual*, *Dustur*, *Mazzatnamu sonari chanda*, *salami* and *percentage* are *abwabs* (h).

If the tenancy was created before 1836, *Batta Company* is *prima facie* not an *abwab*, but if the creation of the tenancy is of subsequent date, it is *prima facie* an *abwab* (i). **Mir Tapurah Hosseln v Gopi Narayan**. 7 C L J. 251.

MOOKERJEE and CASPERSZ, JJ.

References —

- (a) 4 C.W.N. 239, F.
- (b) 6 Wheaton, 104, 9 A. 366, 17 Q.B. 828—85 R.R. 688, R.
- (c) 1r. R. 10 Eq. 117 (127), R.
- (d) 111 U.S. 185 (193), 4 Bom. L.R. 120, R. 15 C. 681, D.
- (e) 1 Cal. & Ill. 10, R.
- (f) 3 M. 234, F. 15 M. 111, 10 B. 32, 12 W.R. 478 (483), 7 B. 217, 21 B. 154, 28 B. 11, 32 J.A. 23 (35)=1 C.L.J. 584—32 C. 296 (314)=7 Bom. L.R. 1, R.
- (g) 5 C.L.J. 242 (F.B.), 6 C. 815 = 8 C.L.R. 157; 29 A. 511=4 A.L.J. 194, R. 26 C. 409, D.
- (h) 7 Mab. Sel. Ref. 166, S.D.A. 680 11 C. 175 (F.B.), 17 C. 726 (F.B.), S.D.A. 4, R.
- (i) 7 C.L.J. 202, R.
- (15) S. 13—Res judicata—Question of title decided in former suit by revenue Court—Former suit instituted wrongly in revenue Court—Appeal to the Civil Court—Suit to be deemed as instituted in right Court.

Civil Procedure Code—(Continued).

In a suit for an annuity for certain years, the defendants denied the title of the plaintiffs. In a previous suit in the revenue Court between the same parties for arrears of revenue of certain other years, it was decided, upon the admission of the defendant, that he was liable.

Held, that the decision of the revenue court operated as *res judicata* upon the question of the title and the defendant was "estopped from re-opening the question in the present suit and the plaintiffs were entitled to receive the amount of the annuity. **Dwarka Das v. Akhay Singh**, 5 A.L.J. 407=A.W.N. (1908), 192.

STANLEY, C.J., and KARAMAT HUSAIN, J.

(16) S. 13—Suit dismissed on an alternative ground, whether *res judicata*.

A decision in a former suit will operate as *res judicata* notwithstanding the fact that the previous suit was decided on an alternative ground of decision. **Mallisheril Ileath Yasudevan Nambudin v. Kooror Cathath Kannan Nambiar**, 4 M.L.T. 90.

WALLIS and MUNRO, JJ.

References.—24 C. 900, F.; 17 A. 174, D.

(17) S. 13—Res judicata—Mortgage—Redemption suits.

Held, by the Full Bench, following the principle of *stare decisis*, that it is open to a mortgagor who has brought a suit for redemption and obtained a decree to bring a second suit for redemption. **Dhanpat Mal v. Jhagggar Singh**, 161 P.L.R. 1908 (F.B.)—93 P.R. 1908=133 P.W.R. 1908.

CHARK, C.J., CHATTERJI and RATTIGAN, JJ.

(18) S. 13—Res judicata—Cross appeals from one decree—Appeal from one of the appellate decrees but not from the other.

If an issue decided against a party is embodied in two decrees and that party appeals from one of them only, the other decree on becoming final operates as *res judicata* and precludes the original and appellate Courts from deciding that issue again. **Abdul Basit v. Ashfaq Husain**, A.W.N. (1908), 211=4 M.L.T. 172.

KARAMAT HUSAIN, J.

References.—10 A. 123; A.W.N. (1890), 183; A.W.N. (1893), 190, 221; S.A. No. 764 of 1891; S.A. No. 140 of 1899; S.A. No. 208 of 1907, F.; 29 M. 333; 16 C. 233; 33 C. 1101; 29 A. 730, diss.

Civil Procedure Code—(Continued).

- (19) S. 13—*Suit against two persons—One of whom was exonerated and a decree passed against the other—Subsequent suit against the exonerated defendant—Bar under S. 13.*

Where in a previous suit the defendant was exonerated, and the petition as against him was dismissed with costs, and a decree for the full amount was given against the other defendant, it was held that this was a dismissal of the claim against the exonerated defendant under S. 13. **Thiruvengadasamy Naidu v. Balagurunatha Chetty**, 4 M.J.T. 413.

SANKARAN NAIR, J.

References.—23 B. 235 and 32 B. 296 (300), D.

- (20) S. 13—*Res judicata—Suit for sale on a mortgage—Compromise by which mortgagee accepted a simple money decree—Second suit for sale barred.*

A suit for sale on a mortgage was compromised on the terms that the mortgagee should accept a simple money decree for the amount of the mortgage debt, and such a decree was accordingly passed. This decree not being satisfied, the mortgagee again sued for sale of the mortgaged property. Held that the suit was barred. **Piari Lal v. Nand Ram**, A.W.N. (1908) 265.

STANLEY, C. J. and BANERJI, J.

References.—33 C. 849, F. 26 A. 223 & A.W.N. (1905), 152, D.

- (20-a) S. 13—*Res-judicata—Plaintiff declining to proceed with suit.*

Where in a previous suit the plaintiff sued R for inheritance of D, and the defendant dying during the pendency of the suit, A applied to be made and was made, a party, but on the plaintiff's statement that he did not wish to proceed against A, the latter was absolved from liability,—

Held, that a subsequent suit against A by the same plaintiff for inheritance of D was barred by *res-judicata*. **Amir Chand v. Durga Das**, 198 P.L.R. 1908.

ROBERTSON, J.

(21) S. 13—*Agreement to undertake the expense of litigation in consideration of receiving a share of land in dispute—Suit for cancellation of agreement—Cancellation refused by Court—Subsequent suit by plaintiffs for enforcement of the agreement—Res judicata—Mixed question of law and fact—See RES JUDICATA, No. 3, 44 P.B. 1908.*

Civil Procedure Code—(Continued).

(22) S. 13—*Res judicata—Dismissal of previous declaratory suit brought by some reversioners to contest alienation on the ground that they had no locus standi—Subsequent suit by other reversioners not party to the former suit, whether barred—See CUSTOMS (PUNJAB), ALIENATION, No. 4, 36 P.W.R. 1908.*

(23) S. 13—*Remission of rent—Previous litigation by the grantee's heirs—Subsequent litigation by the grantee's transferees—Res judicata—See SANAD, No. 1, 7 C.L.J. 202.*

(24)—S. 13, applicability of, to S. 20 of the Dekkhan Agriculturist's Relief Act—See ACT XVII OF 1879 (DEKKHAN AGRICULTURIST'S RELIEF ACT), No. 8, 10 Bom. L. R. 577.

(25) S. 13—*Dismissal of previous suit based on account—Subsequent execution of a cheque for part of the amount—Suit on the cheque, maintainability of.—See RES JUDICATA, No. 7, 116 P. W. R. 1908.*

(26) S. 13—*Mere filing of an appeal—Effect—Appeal dismissed on ground of limitation alone—Effect—Pendency of proceedings by way of appeal—English Law—Indian Law—See RES JUDICATA, No. 8, 4 N. L. R. 98.*

(27) S. 13—*Suit for increase of rent for increased area—Res judicata. See ACT VIII OF 1885 (BENGAL TENANCY), No. 7, 12 C.W.N. 904.*

(27-a) S. 13—*See No. 8. supra.*

(28) S. 13, *Expl. II*—*Res judicata—First suit decided on a preliminary point—Second suit on a point not decided in the first suit.*

Explanation 2 to S. 13 of the Civ. Pro. Code, 1882, must be read in conjunction with, and as part and parcel of, the leading provisions, of the section itself. According to those provisions, several conditions are necessary to constitute a matter *res judicata*. Two of those conditions are (1) that the matter must have been in the former suit directly and substantially in issue and (2) that it must have been heard and finally decided in that suit.

The explanation does no more than lay down that if a matter, which might and ought to have been made a ground of defence in the former suit is not made such a ground, it shall be dealt with as falling within the first of the above-mentioned conditions. That is, the omission shall have the same effect given to it as it would have had if it had been made a ground of defence. But to constitute *res judicata* a second condition is necessary; it must have

Civil Procedure Code—(Continued).

been finally decided, and if the former suit went off on a preliminary ground, not calling for adjudication on any other grounds of defence, whether raised or not, those grounds remain undecided.

The same effect must be given to a matter which might and ought to have been, but has not been made, a ground of defence in the former suit, as must be given to a matter which was made a ground of defence in the former suit. **Abdullakhan Usmankhan v. Khanmiya Arabkhan**, 10 Bom. L. R. 380=33 B 315.

CHANDAVARKAR and KNIGHT, JJ.

(29 & 30) S. 13, Expl. II.—*Res judicata—Successive purchase of the same land at two execution sales—Suit to set aside one such sale—Purchaser's defence—Whether he is bound to set up title acquired at the other sale—Ground of defence which "ought" have been taken.*

A purchased village S in execution of a decree obtained by him against C in the Small Cause Court. Subsequently A through B instituted a mortgage suit against C and in execution of the decree obtained therein purchased some lands in the same village S. C instituted two suits, one to set aside the sale in execution of the Small Cause Court decree and the other to set aside the decree and sale in the mortgage suit. The latter suit was dismissed for default but the former succeeded. In this suit, A did not set up as a ground of his defence the title obtained by him at the mortgage sale.

Held—that A was not bound to do so, and a suit by A to recover the lands in Village S purchased at the mortgage sale is not *res-judicata* under Expl. II of S. 13 of the Civ. P. Code.

Per Brett, J.—Expl. II of S. 13 of the Civ. Pro. Code refers to the title litigated in the former suit as distinguished from relief claimed. When several independent grounds of action are available, a party is not bound to unite them all in one suit though he is bound to bring before the Court all grounds of attack available to him with reference to the title which is made the ground of Action. This rule equally applies to the converse case of a defendant when pleading in his defence (a). **Mohabir Tewari v. Purbhoo Nath Chowbey**, 12 C.W.N. 292=7 C. L. J. 504.

BRETT and WOODBOUFF, JJ.

References.—(a) 12 L. A. 116, and 26 M. 760, *relied on*.

Civil Procedure Code—(Continued).

(31) S. 13, Expl. II.—*Res judicata—Matter which should have been made a ground of defence in previous suit—Subject-matter, if must be identical—Rent suit—Ex parte decree—Flea of payment not raised—Claim of set off in subsequent rent suit.*

In a suit for rent, the defendant claimed a set off for a certain sum which, he said, he had paid on account of previous arrears of rent, but for which no credit had been given by the plaintiffs in a suit for the rent of that period. That suit had been heard *ex parte* and decreed in the plaintiff's favour.

Held, that the plea of payment now raised should have been made a ground of defence in the previous suit, and the defendant was precluded from claiming a set off in regard to it by Expl. II of S. 13 of the Civ. Pro. Code (a).

Scumble, per RYVES, J.—The Privy Council in G.C.W.N. 889=24 A. 249 has by implication overruled the decision in 1 C. W. N. 565=24 C. 711. **Jamadar Singh v. Serazuddin Ahmed Chowdhury**, 12 C. W. N. 862=8 C.L.J. 82.

RAMPINI C. J. and RYVES, J.

References.—(a) 1 C. W. N. 565=24 C. 711 and 1 C. L. J. 248. *Considered*; and 20 A. 110, F. 6 C. W. N. 889=24 A. 249, R.

(32) S. 13, Explanation II.—*Suit by auction-purchaser—Second relief for sale upon mortgage.*

A property was mortgaged first to B, then to H. Both the mortgagees brought suits for sale without joining the other mortgagee and obtained decrees and sold and purchased the mortgaged property. H executed his decree first and obtained possession. B applied for mutation of names and was resisted by H. He brought a suit for possession as auction-purchaser. The suit was dismissed. He then brought the present suit, as mortgagee, for sale, making all the persons interested, including H, parties to the suit. *Held*, that the suit was not barred by the rule of *res-judicata* inasmuch as B in the suit for possession, as auction-purchaser, was not litigating under the same title as he was in the present suit.

Held further, that the relief for sale could not have been joined in the suit for possession by the auction-purchaser. **Raghubir Saran v. Het Ram**, 5 A.L.J. 729.

RICHARDS, and GRIFFIN, JJ.

(33) S. 13, Explanation 2—points not relied upon before District Judge, whether can be relied upon before High Court—Matter which

Civil Procedure Code—(Continued).

might and ought to have been made ground of defence—See RES JUDICATA, No. 2, 5 A.L.J. 117.

(33-i) Ss. 13, Ex. II, & 42—*Res judicata*—Necessity for a person, claiming property as heir of another, bringing up all the kinds of relationship in one suit—See RES JUDICATA, No. 11, 31 M. 385.

(33 a) Ss. 13 and 43—*Plaintiff suing as administrator formerly—Subsequent suit by him for share in deceased's estate—Whether subsequent suit res judicata.*

A plaintiff, who formerly sued as the administrator of the estate of the deceased, subsequently sued for his share in the same estate. The former suit had been dismissed, one of the grounds of the decision being that the plaintiff had received his share by way of remission of a debt due by him to the deceased. *Held*, though the same issue was involved in the subsequent suit, yet the title under which the parties litigated was not the same and that the later suit was not barred **Maung Saw Bwa v. Maung Saw Ke**, 11 Bur. 1, K. 334.

IRWIN, C. J., & ORMAND, J.

Reference.—21 C. 157, R

(34) Ss. 13 and 43—Suit for share in inheritance—Subsequent claim for dower—Maintainability. See CASE OR ACTION No. 1, 11 O C. 69.

(35) Ss. 13, 43 and 44—*Res Judicata—Joinder of causes of action—Right to sue—Presumption of correctness of a genealogical table prepared at Settlement—Custom—Inheritance—Escheat to the proprietary body—New case set up in the Chief Court on appeal.*

In 1875. N. & S. sued in the Court of a Munsiff, 1st class, to contest the validity of the adoption of K. by H. That suit was dismissed, it being found, firstly, that N. & S. were not collaterals of H., and so had no *locus standi* to object, and, secondly, that the adoption was valid.

K having died without issue, N & S. filed a suit for possession of the movable and immovable property of K, as collaterals of his adoptive father H. D and others, proprietors of and in possession of the land, also filed another suit for declaration of their title to succeed as the proprietary body denying the relationship of N. & S. with H.

Civil Procedure Code—(Continued).

Held—(I) That the question, whether N and S. are collaterals of H. or not, is not barred by *res judicata* by reason of its being decided in the previous suit in 1875, as—

(a) The Court trying the first suit, a Munsiff with jurisdiction up to Rs. 1,000 only, had no jurisdiction to try the subsequent suit which was valued at more than Rs. 1,000.

(b) D & C. cannot be said to be suing as representatives of H. and K, who were defendants in the previous suit. The claim is simply a claim founded on the custom of escheat in favour of the proprietary body who no more represent the deceased than the crown does in cases in which property lapses to the Crown for want of heirs.

(11) A party claiming as an heir can and should sue for the whole of the estate, both movable and immovable, in one and the same suit (a).

(III) Although a presumption exists by law in favour of the correctness of the pedigree table as prepared at a settlement, such presumption is greatly weakened, if the contents of that document are vague.

(IV) The contention of N. & S. that they were also members of the proprietary body, along with D and others, could not be entertained in the Chief Court, where it was raised for the first time on appeal. **Ram Singh v Dula Singh**, 58 P W R. 1908

ROBERTSON and CHEVIS, JJ.

Reference (a) 10 M. 375, F.

(36) S. 16 A sub-S. 2, Court to proceed under.—where objection to jurisdiction taken for first time on appeal—Uncertainty—See JURISDICTION (GENERAL), No. 2, 7 C.L.J. 152.

(37) S. 16 (d)—*Sale of immovable property in foreign territory by order of British Insolvency Court—Property not solely that of insolvent—Two-thirds of property owned by plaintiffs—Suit to recover two thirds of purchase money, whether a suit for the determination of an interest in immovable property—Jurisdiction—Division.*

A house, which was the joint property of the plaintiffs and the defendant, their brother, who became an insolvent, was situate in a place within the jurisdiction of a foreign state. It was sold by the order of a British Insolvency Court during certain insolvency proceedings taken against the defendant. The proceeds of

Civil Procedure Code—(Continued).

the sale, after deducting commission, were made over to another defendant, who was the mortgagee-creditor of the defendant, and the plaintiffs sued the mortgagee creditor for a refund of their two-thirds share of the purchase money.

Held that the suit directly affected an interest in immovable property, and, as such, was one "for the determination of any right to or interest in immovable property," within the meaning of S. 16 (d) of the Civ. Pro. Code, that it could only be taken cognizance of by the Court within whose jurisdiction the property was situate, and as such was not maintainable in British Courts (a); nor, should there be any doubt on the question of jurisdiction, was it a proper case for interference on revision. **Hari Ram v. Kanshi Ram**, 122 P.R. 1908.

KENSINGTON and LAL CHAND, JJ.

References—(a) 28 M. 227, F. 4 B H. C. 173, 6 B. H. C. 29, 23 B. 22, 24 B. 407 6 M 344, R.

(38) *Ss. 16 and 19—Misjoinder of parties—Multi-fariousness—Suit by heir to recover property from co-heir and transferees from him—Property situate in different districts—Compromise of part of claim—Jurisdiction.*

The plaintiff sued as heir of her father to recover from her brother and from certain transferees from him her share in the property of her deceased father. The suit was brought in the Court of the Subordinate Judge of Bareilly. Part of the property claimed was situated in the Bareilly district and part in the district of Bara Bangi in Oudh. During the course of the suit a compromise was arrived at regarding the Bareilly property and the suit proceeded with reference to the property in Oudh alone. *Held* (1) that the plaintiff had properly impleaded her brother and the transferees from him as co-defendants in one suit, and (2) that, there being no fraud or improper motive alleged with reference either to the compromise or to the filing of the suit in the Court at Bareilly, that Court was not by reason of the compromise divested of jurisdiction to hear and decide the suit in respect of the property situate in Oudh. **Kubra Jan v. Ram Ball**, A W N. (1906), 235 = 5 A.L.J. 647 = 4 M.L.T. 392.

STANLEY, C.J., BANERJI and GRIFFIN, JJ.

References.—A.W.N. (1885), 125, *overruled*, 11 A. 33, 24 A. 358, 29 A. 267, 24 C. 831 and 29 C. 371, *reft. to*; 16 A. 279, D; 12 M. 380, F.

Civil Procedure Code—(Continued).

(39)—S. 17—Debtor and creditor—Place of payment not specified—Debtor to follow his creditor and pay the debt—See **CONTRACT**, No. 3, 11 O. C. 191.

(40) S. 17, *Expl. III*—Place where contract was to be performed or performance thereof completed—Place of suing—Jurisdiction.

Plaintiff is a resident of Lahore and defendant a resident of Cochin. The parties made a contract under which defendant was to supply plaintiff with certain goods and send them off for Lahore within one month. Plaintiff paid in advance, a part of the price fixed, and the balance was to be paid by a bill drawn by defendant on plaintiff's firm at Lahore.

The goods were not despatched, and plaintiff sued for the recovery of the money paid in advance and for damages, and the question was whether the Lahore Court had jurisdiction.

Held the suit lay at Lahore as that was the place where the contract was to be performed or performance thereof completed, within the meaning of *Expl. III* (2), S. 17, C. P. C. **Premji Khetsey v. Ghulam Sarwar Khan**, 36 P.R. 1908 = 85 P.W.R. 1908.

CLARK, C. J.

References.—27 M. 355, 70 P. R. 1906, 1 Bom. L. R. 76, 70 P. R. 1906, R.

(41) S. 17, *Expl. III*—Promissory note executed within jurisdiction of one Court—Note payable on demand—Place of payment not specified—Plaintiff suing in place different from place of execution of note—Cause of action where arises—Jurisdiction of Courts

The note sued upon was executed by the defendant at T, of which he was a resident; and within the local limits of the jurisdiction of another place, K, the plaintiff brought the suit. It was payable on demand, no place of payment being fixed in it. The plaintiff claimed the right to sue at K, on the ground that the debt was impliedly payable there, (S. 17, *expl. III* (iii), Civ. Pro. Code). The defendant objected that the Court at K had no jurisdiction;

Held that the general rule that, where the place of payment is not specified, expressly or by implication, in a promissory note, the debtor must seek his creditor to pay him, cannot be relied on as controlling the express words of a statute prescribing the conditions which give a Court local jurisdiction (a), *viz.*, of S. 17, *expl. III*, Civ. Pro. Code. The place where the cause

Civil Procedure Code—(Continued).

of action, arises is governed, not by any general rule of law, but by S. 17 of the Code of Civil Procedure, and it is the place where, in performance of the contract, any money to which the suit relates is, expressly or impliedly, payable.

Held, further, that as in the present case the only fact, either with reference to the terms of the contract, or with reference to the circumstances in which the contract was made, which can be said to raise a implication that the money was to be payable at K, is the fact that the plaintiff resides there, and as this fact is not sufficient to raise this implication and as there is no evidence that it was the practice, in the ordinary course of business, for money to be paid at K, the Court at K had no jurisdiction to entertain the suit against the defendant. **Raman Chettiyar v. Gopalachari**, 31 M. 223 = 4 M. L. T. 97.

WHITE, C. J., and MILLER, J.

References.—(a) A. C. 525 (1898), 36 Ch. D. 453; 1 Q. B. 753, R. 30 B. 167, D.

(41-a). S. 19—See No. 38, *supra*.

(12) S. 29—*Suit for profits of partnership—Partnership entered into at Lahore—Business carried on at Hansi—Plaintiffs residents of Khurja—Alleged contract to remit profits to the plaintiffs' place of residence not proved.*

S. 20, Code of Civil procedure, enables the Court to stay a suit upon application made for that purpose. It does not empower the Court to entertain a suit, which otherwise it would have no jurisdiction to entertain.

A partnership was entered into at Lahore, and the firm was carrying on the business at Hansi in the Punjab. Plaintiffs were partners of the firm residing at Kurja in the United Provinces. They brought a suit for their shares of the profits in the Court at Aligarh, on the basis, of an alleged special contract, by virtue of which their share of the profits had been agreed to be remitted to Kurja. The alleged contract was not proved. *Held*, that the Court below ought not to have entertained the suit and should have returned the plaint for presentation to the proper Court. **Banka Mal v. Shiam Lal**, 5 A. I. J. 88 = A. W. N. (1908), 46.

STANLEY, C. J. and BURKITT, J.

(43)—Ss. 20 & 24—Two suits between the same parties in two Courts under jurisdiction of two different High Courts—Power of High

Civil Procedure Code—(Continued).

Court to order stay of proceedings in one Court—See PRACTICE, No. 7, 35 C. 541.

(43-a) S. 24—See No. 43, *supra*.

(43-b) S. 25—See No. 119, *infra*.

(44) S. 26—*Parties—Partners.*

Where the plaintiff's partner claimed to be a co-plaintiff with the plaintiff, but the latter refused to join him and the suit was dismissed,

Held, that the order of dismissal was right. **Hussain Khan v. Hira Lal**, 18 P. L. R. 1908. (2nd case).

CLARK, C. J.

(45) Ss. 26 and 28—*Suit by transferee of mortgage against mortgagor and mortgagees (transferor)—Portion of mortgage debt discharged prior to transfer—Misjoinder of defendants—English rules 1 and 4, order XVI.*

Per Benson and Wallis, J.J. (White, C. J., Diss). Where the transferee of a mortgage has brought a suit for sale against the mortgagor and has joined therewith a claim against his transferor (the original mortgagee) for damages in case it should appear that any portion of the mortgage debt had been discharged by the mortgagor before the date of the transfer and so not be recoverable in the present suit from the mortgagor, *held*, the suit is not bad for misjoinder of defendants.

Per Wallis, J.

The use of the less definite words "in respect of the same matter" in S. 28 (than the words "in respect of the same cause of action" in S. 26) would seem to show that it was intended to allow joinder of defendants not only when relief was sought in respect of the same cause of action, but also when relief is sought in respect of separate causes of action against the different defendants so long as they all arise "in respect of the same matter."

English decisions under Rule 4, order XVI, are not applicable to S. 28, Civ. Pro. Code, as the scope of the section is wider than that of the rule.

Obiter. English decisions on rule 1, order XVI, apply to cases of joinder of plaintiffs under S. 26 of the Civ. Pro. Code. **Aiyathurai Ravuthan v. San Muhammad Meera Ravuthan**, 18 M. L. J. 238—31 M. 252.

WHITE, C. J., BENSON and WALLIS, J.J.

Civil Procedure Code—(Continued).

References —25 M. 736, 27 M. 80, 29 M. 50, 8 C. 170, 8 C. 963, 12 C. 555, 81 B. 516, R.

(46) *Ss. 26, 28, 32 & 33—Misjoinder of causes of action and parties—Redemption suit—Mortgagor and his transferee of a portion of the mortgaged property can sue together to redeem it—Rejection of plaint—Revision—Punjab Courts Act (XVIII of 1884), S. 70 (a & b).*

N, B, sons of the original mortgagor and J, N, to whom the equity of redemption of a part of the mortgaged property had been sold joined in the suit for redeeming it. They also alleged that the mortgagees had wrongfully taken possession of a portion of the property in dispute in excess of what was mortgaged.

Held, that the suit was rightly framed inasmuch as there was one interest between all the plaintiffs and only one cause of action.

Held, also, that an order rejecting a plaint on the ground of misjoinder of parties or causes of action is open to revision either under cl. (a) or (b) of S. 70 of the Punjab Courts Act (XVIII of 1884). **Nihal Singh v. Chaugatta Singh**, 9 P.W.R. 1908.

CLARK, C.J.

(17) *Ss. 26, 173, and 180—Practice—Right to begin—Defendants supporting plaintiff must begin before defendants opposing him—See PRACTICE, No 5, 10 Bom. L.R. 327.*

(18) *S. 27—whether cover the case of the non-joinder of a necessary party—See PARTNER-SHIP, No 4, 1 Sind. L.R. 191.*

(19) *S. 28—Malversation of ward's property by guardian—Property sold to and in possession of different defendants—Suit by ward against guardian, and the others for recovery of property—Whether parties and causes of action misjoined.*

Where, in a suit by a ward, the cause of action arose from the malversation of the guardian in regard to his ward's property and from the ward's right to have an account of his property and to recover it, and where the persons, to whom the ward's property was sold and who were in possession of it, were made co-defendants with the guardian, *held* that, under S. 28 C. P. C., there was neither misjoinder of parties nor of causes of action. **Dorasawmy Pillay v. Angammall**, 3 M.L.T. 296=18 M. L.J. 267.

PENSON and MILLER, JJ.

Civil Procedure Code—(Continued).

(50) *S. 28—Suit by trustee—Co-trustee made defendant without showing that he refused to be joined as plaintiff.*

A suit by a trustee, in which he joined a co-trustee as one of the defendants, should not be dismissed merely because it was not shown that the co-trustee refused to be joined as plaintiff. It is immaterial whether the co-trustee is made a defendant or a plaintiff. **Rasu Mudaliar v. Veerasawmi Pillai**, 4 M.L.T. 191.

WALLIS, J.

References —14 M. 489, 24 M. 296, not F., 29 M. 303, 46 C. 409, F.

(50-a) *S. 28—See Nos. 45 & 46, supra.*

(51) *Ss. 28, 43, 45, and 539—Suit to appoint a trustee and to recover trust properties—Joinder of parties—Stranger to trust, whether can be joined as party—Widow and heir of trustee—See TRUSTS, No 3 1 L.B.R. 183.*

(52) *Ss. 28 and 45—Misjoinder of causes of action—Suit for partition by some of several melvaramdars—Kudvaramdars made parties to the suit, whether bad for misjoinder.*

Where, in a suit by some of several *melvaramdars* of a village, for the partition of the village not only the other *melvaramdars*, but also the *ryots* or *kudvaramdars* were made defendants for the purpose of determining and defining certain rights as between the *melvaramdars* and the *kudvaramdars* it was held that the suit was bad for misjoinder of causes of action.

Obiter dictum—In a suit for the partition of joint family property or in an administration suit, though it might be convenient to ascertain the precise amount of the debts due to the estate yet the making of all the debtors to the estate parties to the suit, with a view to recover the debts or establish such debts by a binding declaration is bad for misjoinder of causes of action. **Ramkrishna Aiyar v. Krishna Aiyar**, 18 M. L. J. 85.

WALLIS and SANKARIN NAIR, J.J.

Reference —6 M. 90 R.

(53) *S. 30—Dismissal of suit—Non-service of notice—non publication of advertisement.*

The suit was dismissed on the ground that the notices required to be served under S. 30,

Civil Procedure Code—(Continued).

C. P. C. were not served, nor was any advertisement published; but the plaintiff applied, in his plaint, for permission, and the defendant in his written statement mentioned the names of the other persons interested in the plaint property.

Held, as the plaintiff asked for permission in the plaint, even though there was no express order granting it, the presumption was that it had been granted, inasmuch as the plaint was admitted and registered.

It is the duty of the Court to cause service of notices or the publication of advertisement.

The plaintiff's suit should not have been dismissed for the failure of the Court to perform the duties imposed upon it by the section. **Mukh Lal Singh v. Jagdeo Tewari**, 35 C. 1021.

MITRA and BELL, JJ.

(51) *Ss. 30, 303 and 339—Suit for a scheme of management of a temple and for appointment in the meanwhile of a receiver—Temple property subject of suit*

This was a suit brought under S. 339 and S. 30, C.P.C., for a declaration that a scheme of management of a temple is binding and in the alternative for the settlement by the Court of a scheme and for the appointment in the meanwhile of a receiver.

Held the property of the temple was a subject of the suit within the meaning of the word in S. 503, C.P.C., and that the Court had jurisdiction to appoint a receiver.

The whole aim and object of the suit was to regulate the collection and distribution of the property of the temple, and even though there was no application for the removal of the *Dharmakarthas* (in which case there could be no doubt that the Court would have power to appoint a receiver pending the appointment of fresh *Dharmakarthas* to take charge of the property of the temple) the subject of the suit was the same in both the cases, namely the property of the temple. **K.A. Yeeraraghava Thathachariar v. R. Krishnaswami Thathachariar**, 4 M.L.T. 88.

BODDAM AND MUNRO, JJ.

(55) *Ss. 30 and 339—Plaintiffs suing as members of Muhammadan community, every member of which is entitled to bury his dead anywhere in a wakf graveyard—whether each plaintiff should show he has used graveyard—*

Civil Procedure Code—(Continued).

Ss. 30 and 339, C.P.C. whether applicable to such case—See MAHOMEDAN LAW (WAKF), No. 3, 78 P.L.R. 1908.

(56) *S. 32—Addition of party by Court after period of limitation—Effect. See LIMITATION ACT, No. 32, 11 C.W.N. 350=35 C. 519.*

(56 a) *S. 32—See No 46, supra.*

(57) *Ss. 32 and 424—Whether a fresh defendant can be substituted for a sole existing defendant against whom no cause of action is found to exist—Whether notice under S. 424 is necessary in case of adding a public officer as co-defendant in a case against Secretary of State. See ACT XVIII of 1850 (PROTECTION OF JUDICIAL OFFICERS), No 1 59 P.W.R. 1908.*

(58) *Ss. 32 and 578 (b)—Court's power to strike out name of co defendant after first hearing—Appeal.*

Under S. 32, a Court is not competent to strike out a co-defendant's name after the first hearing of a suit. An appeal lies under S. 588 (b) from the Court's order returning the plaint for amendment in this particular after the first hearing. **Fateh Ali v. Nizam Din**, 71 P.R. 1907=37 P.L.R. 1908.

RATHBURN, J.

References—7 A. 79 (F B), F; 1 P.R. 1900 11 B. 232, 1 P.R. 1903, R

(59) *S. 34—Non joinder of parties—Defendant not objecting to such non-joinder till a suit with fresh parties was barred—Plaintiff getting names added after limitation period—Objection to non-joinder to be dismissed under S. 34, Civil Procedure Code. See LIMITATION No 12, 5 A.L.J. 551.*

(60) *Ss. 37, 51, 578—Conditions for summary judgment—Absence of principal from jurisdiction—Objections first raised in second appeal—Maintainability*

In this case the suit was brought and the plaint was signed by a duly authorized agent holding a general power of attorney. The proceedings did not show that the principal was living away from the jurisdiction of the Court at the time of bringing the suit; nor was it shown that he was unable to sign the plaint himself owing to absence or any other good cause. Objections on these grounds were taken for the first time in second appeal.

Held, that the mere fact that the plaint in a suit has not been signed by the plaintiff named therein or by any person duly authorized in that behalf, as required by S. 51 of the Code, will not necessarily make the plaint absolutely

Civil Procedure Code—(Continued).

void, and that the defect in the signature in the plaint or the absence of signature, where it appears that the suit was in fact filed with the knowledge, and by the authority, of the plaintiff named therein, may be waived by the defendant and, having regard to S. 578 of the Code, is not a ground for interference in second appeal.

Held, further, that such objections might have been raised in the original proceedings, when the fact of the plaintiff's absence or otherwise would have been inquired into by the lower Court. **The Zan v. Tha Dun**, 4 L.B.R. 284.

HARTNOEL, J.

References—8 Bur. L.R. 103, 1 L.B.R. 191, 6 B.H.C. 159, 2 L.B.R. 41, 22 A. 55, 11, 15 W.R. 245, 12 B. 69, P.

(60-a) S. 42—See No. 33-1, *supra*.

(61) S. 13—*Several breaches of covenants made under one contract—Maintainability of separate suit for each breach—Cause of action.*

When principal and interest are both due under a mortgage bond, S. 43, says there can only be one suit for both. This cannot be overridden by an agreement between the debtor and the creditor that separate suits might be brought. Where there are several breaches of covenants made under one contract, one way of looking at the matter is that, at the date of the latter breach, the right of action based on the earlier breach, if it is not barred by limitation, is merged in that arising out of the latter breach. All the covenants to be performed under any contract, before the suit is brought, are to be treated as joined and merged into one by the contract, and the breach of all the covenants, enforceable before that time, deemed as one breach. **Ganga Ram v. Abdul Rahman**, 28 P. R. 1907 = 93 P. L. R. 1908 = 140 P. W. R. 1907.

CHATTERJI and RATTIGAN, J.

References—8 C. P. 107, 22 Q.B.D. 128, 15 I. A. 156, 22 C. 333, 16 A. 165, 25 A. 48, 6 C. W. N. 585, 17 P. R. 1897, 123 P. R. 1881, 129 P. R. 1869, 21 B. 267, 18 M. 257, 11 M. 210, 24 M. 431, 27 M. 116, 12 C. 339, 19 C. 372, 12 A. 203, 15 I. A. 66, 5 B. 181, 7 Q.B.D. 493, R.

(62) S. 43—*Separate suits in respect of separate breaches of the same contract.*

Quære whether section 13 of the Code of Civil Procedure prohibits the bringing of separate suits in respect of two separate and distinct

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breaches of the same contract. **Kedar Nath v. Suraj Narain**, A.W.N. (1908), 190.

RICHARDS, J.

References—12 C. 339 and 19 C. 372, R.

(63) S. 43—*Prior suit for possession of lands—Subsequent suit for mesne profits of same lands, not barred.*

Where a person, after filing a suit for possession of certain lands, filed a suit for mesne profits of the same lands, *held*, that S. 43 does not bar the subsequent suit. **Gutta Saramma v. Maganti Ramanadu**, 4 M.L.T. 192 = 31 M. 405.

BENSON and WALLIS, JJ.

References—11 M. 210, 9 C. 283, and 19 C. 615 P., 11 M. 151, not F.

(64) S. 43—*Suit for redemption decreed—Second suit for surplus profits recovered by mortgagee during mortgage, maintainability of, under section—Art. 105 of Limitation Act not to be construed so as to conflict with section—See MORTGAGE (REDEMPTION), No. 9, 5 A.L.J. 192.*

(64-a) S. 43—See Nos. 31, 35 and 51, *supra*.

(65) S. 13 and 43—*First suit for declaration of right and partition—Second suit for partition of joint property—Cause of action identical—First suit withdrawn—Second barred—Limitation Act (XV of 1877), Art. 106—Suit for partition, a suit for a share in dissolved partnership.*

The plaintiff brought a suit for declaration that certain property in Moradabad District purchased by the defendant in his name, was purchased with the money belonging to the parties and taken out of the partnership business of which the parties were joint owners and for partition of that property. The suit was withdrawn without permission to bring a fresh suit as the parties referred the matter in dispute to arbitration. The arbitration fell through and the plaintiff brought the suit for partition of certain property situate at Naini Tal which had been purchased in the joint names of the parties. In the plaint, he alleged that the property at Naini Tal was purchased with the profits of the partnership business. *Held*, that the cause of actions in both the suits were identical and the second suit was barred by S. 49 of the Code of Civil Procedure as the plaintiff ought to have included his present claim in the first suit. *Held*, further, that the suit was barred by S. 373 of the Code. *Held* further, that the suit was

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also barred by art. 106 of the Limitation Act inasmuch as it was a suit for a share in the profits of a partnership which had been dissolved more than 3 years before the suit. **Niaz Ahmad v. Abdul Hamid**, 5 A.L.J. 278 = A.W.N. (1908), 131 = 30 A. 279.

AIKMAN and KARAMAT HUSAIN, JJ.

(66) *Ss. 43 and 525—Award of arbitrators—Suit for specific performance of contract of sale—Subsequent suit for possession—Maintainability—Specific Relief Act, S. 42.*

S. 43 of the Code of Civil Procedure can have no application to an application made under S. 525 of the Code.

An arbitration award was to the following effect:—"Let the entire village of Butama be sold to the creditor for Rs. 3,300. Let the remainder of the debt be forgiven. Let the whole of the *sir* and *khudkasht* land be left for the maintenance of the debtors. Let the house which is mortgaged to the creditor be given to the debtors free of incumbrance."

A decree was passed by the Court for specific performance of the award, and the defendants having failed to obey the decree of the Court, the Court itself executed a sale deed under S. 262 of the Civ. Pro. Code. Upon the basis of this deed, the plaintiff brought the present suit for possession of the village.

Held, that the plaintiff was not compelled by S. 42 of the Specific Relief Act to add a prayer for possession in the previous suit for specific performance, and that S. 43, C.P.C. (1882) was no bar to the present suit by the plaintiff for possession. **Sheodia v. Mt. Godhi Bai**, 4 N. L.R. 14.

STANYON, AD. J.C.

References:—22 M. 24, *Diss*; 18 B 537, *F*.

(67) S. 44—Suit to recover possession of property belonging to religious institution, with means profits realized therefrom—Whether bad for misjoinder of causes of action—See *LIMITATION ACT*, No. 104, 35 P. W. R. 1908.

(67-a) S. 44—See No. 35, *supra*.

(68) S. 44 (a)—Whether defendant may by his conduct waive the benefit of the rule contained in this section. See *RELIGIOUS ENDOWMENTS*, No. 5, 8 C. L. J. 196.

(68-a) S. 45—See Nos. 51 and 52, *supra*.

(69) *Ss. 48 and 54—Presentation of insufficiently stamped plaint—Making up of stamp duty subsequent to the period of limitation for*

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the suit—Validity—See *LIMITATION ACT*, No. 1, 123 P. R. 1907 = 82 P. W. R. 1907.

(70) S. 50—*Plaint—Amendment—Plaint barred by time on the face of it—Amendment to bring the claim within time cannot be allowed—Practice—Plaints in short causes—Counsel setting or drafting plaint—Discretion to allow on taxation counsel's fees.*

A suit was brought to recover a sum of money from defendants. The claim as made out in the plaint was on the face of it barred by time. At the hearing, the plaintiff sought leave to amend the plaint by relying on a document which brought the claim within time, but which was not mentioned in the list of documents annexed to the plaint—

Held, that the plaint which was bad on the face of it could not be allowed to be amended in the way suggested.

All amendments in a plaint which do not cause an injustice to the other side are allowed; but if the amendments put the other side into such a position that they must be injured, they ought not to be made (a).

The Taxing Master should allow counsel's fees on taxation, where plaintiffs, in short causes are drawn by counsel, if he is of opinion that it was not unreasonable to submit them to counsel to be drafted or settled. **Gunnaji Bhavaji v. Makanji Khushalchand**, 10 Bom. L.R. 969.

RUSSELL, J.

References:—(a) 16 Q. B. D. 556, 19 Q.B. D. 391, 32 W. R. 262, *F*.

(71) S. 50—Plaintiff stating in plaint what in his opinion is the ground to get over the bar of limitation—Right to change the ground to get over the bar of limitation subsequently—See *LIMITATION*, No. 5, 10 Bom. L.R. 346.

(72) S. 50—does not prevent plaintiff from entering in plaint approximate amount of damages claimed and offering to pay more Court fees if the damages should prove heavier than anticipated—See *COURT FEES ACT*, No. 11, 17 M. L. J. 625.

(73) S. 50—*Illus. (b)—Administrator, suit by—"Letters" must issue before he can sue—Non-suit.*

No suit is maintainable when instituted by a person in his capacity as the administrator of the estate of a deceased person unless and until letters of Administration are issued to him to entitle him to sue in such representative capa-

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city. **The Administrator-General of Bengal v. Lalit Mohan Roy**, 12 C. W. N. 738.

FLETCHER, J.

- (74) S. 51—*Plaint to be signed by plaintiff—Cases when signature is dispensed with—"Good cause," significance of the words.*

S. 51 of the Civ. Pro. Code contains a rule and an exception to that rule. The rule is that plaintiff and his pleader, if any, shall sign the plaint. Where there is a pleader to sign, no exception is made. But for plaintiff's personal signature an exception is provided for specified reasons. When resort is had to the exception, such reasons must be asserted in every case. It is a misinterpretation of the proviso to say that "absence" is a good cause of not signing. It is only absence of such a kind as makes signature impossible that would make this part of the proviso applicable. But the words "other good cause" are of a wider significance, and, in effect, leave the matter to the discretion of the Court, for each case must be treated by itself. So, unless by reason of absence or other good cause, the plaintiff is unable to sign, the language of S. 51 is imperative that he shall sign (a). **Chandra Mal v. Ganpat Rao**, 4 N.L.R. 117.

STANYON, J.C.

Reference.—(a) 16 C.P.L.R. 103, 11.

- (74 a) S. 51—See No. 60, *supra*

- (75) S. 53—*Plaint in a suit for injunction, whether could be amended into one for possession—Alteration in the relief prayed for, whether alters character of suit.*

Plaintiffs sued for an injunction restraining the defendant from interfering with their dealings, in respect of certain property of theirs, of which the defendant had taken wrongful possession. On the defendants pleading title to the property, plaintiffs prayed for amendment of their claim by claiming possession and damages.

Held, that a suit for a declaration cannot be regarded as inconsistent with one for possession (a) and that an alteration in the relief prayed for, would not alter the character of the suit, so as to prevent an amendment of a plaint in that respect (b) **Harji Mal v. Pokhar Das**, 135 P.R. 1906 117 P.L.R. 1908

REID, C.J.

References.—(a) 11 M. 295, & 15 M. 15. F. (b) 20 C. 805 & 26 C. 845, 1 P.R. 1900 & 161 P.R. 1888, R.

Civil Procedure Code—(Continued).

- (75-a) S. 53—See No. 46, *supra*.

- (76) Ss. 53, 54, 588 and 589—*Amendment of plaint—Finality of appellate order confirming order of amendment—Revision—S. 70 of Act XVIII of 1884, as amended by Act XXV of 1899.*

Held, that an appellate order, confirming an order returning a plaint for amendment, is final under the last para. of S. 588 C.P.C., and is consequently not open to revision under S. 70 of Act XVIII of 1884, as amended by Act XXV of 1899, but its legality can be questioned in appeal from the final order rejecting the plaint, if one lies in the case to the Chief Court **Malang v. Mohammad Alias**, 15 P.W.R. 1908.

REID, C.J.

- (76 a) S. 54—See Nos. 69 & 76, *supra*.

- (77) S. 59—*Documents not mentioned in the plaint—Inspection by defendant before filing written statement—Practice.*

It has heretofore been the practice, not to order the plaintiff to give inspection of documents, other than those relied on in the plaint and included in the list of documents annexed to the plaint, as required by S. 59 of the Code, till after the written statement is filed.

This is not, however, an inflexible rule in all cases. There may be cases, where it would be imperative to order the plaintiff to produce and give inspection to the defendant of a document which he may not have mentioned in the plaint, or enumerated in the list of documents annexed thereto. **Khetaldas v. Narotum Das**, 9 Bom. L. R. 1084=32 B. 152.

DAVAR, J.

- (78) Ss. 68, 69, 96, 100, 101, 112 and 113—*Suit set down for an ex parte decree before the date fixed in the summons for hearing—Practice. See EX PARTE DECREE, No. 1, 10 Bom. L. R. 301.*

- (78-a) S. 69—See No. 78, *supra*.

- (79) Ss. 80, 162, 506, 624, 629—*Notice, service of, if proper—Service on the outer-door of the office—Review, order on, if can be questioned in appeal from final decree—Guardian of minor applying to refer to arbitration—Leave or consent of Court, if necessary.*

Affixing a notice to the outer-door of the office in which the person to whom the notice was addressed works as an employee is not a good service under S. 80 of the Code of Civil Procedure.

Civil Procedure Code—(Continued).

Under S. 629 of the Code of Civil Procedure, it is open to the appellant on the appeal from the final decree, to take objection to the order passed on the application for review.

A Judge (not being a Judge of the High Court), other than a Judge who delivered the judgment, has no jurisdiction to grant an application for review on the ground that no leave or consent of the Court under S. 462 of the Code of Civil Procedure had been given to the guardian *ad litem* to refer the matter in dispute between the parties to the suit to arbitration.

Semble.—Such leave or consent of the Court to the application by all the parties to refer the matter to arbitration is not necessary under S. 462 of the Code of Civil Procedure (*a*) **Annada Krishna Dey v. Jogendra Nath Dey**, S.C.L.J. 294.

MACLEAN, C.J., and CONN. J.

References —(*a*) 28 A. 35, *App.*, 24 M. 326, not *F.*

(80) S. 82—Duty of Court under section before proceeding with appeal—See LIMITATION ACT, No. 116, 18 M.L.J. 96.

(81) S. 82—Substituted service when to be granted. See ACT IV of 1869 (DIVORCE), No. 1, 4 L.B.R. 195

(82) *Ss. 82 and 174*—No declaration by Judge under S. 82—Whether invalidates order under S. 174, *Civ. Pro. Code*.

The omission of the Judge to record under S. 82 of the Code an express declaration that the process was duly served cannot invalidate his order under S. 174 of the Code **Sree Krishna Das**, *In re*, 4 M.L.T. 288.

MILLER and PINNEY, JJ

(82-a) S. 96—See No. 78, *supra*.

(83) S. 97—Dismissal of suit under S. 97 *Civ. Pro. Code* (Act XIV of 1882) for not paying process fee—S. 97, *C. P. C.* applies only to first hearing—Course to be adopted after plaint is returned for amendment—Chief Court's power of revision.

Held, that when a plaint is returned for amendment the proper course is to give another date for next hearing of the case after the day by which the amended plaint is to be re-filed.

Held also, that S. 97 *C. P. C.* is applicable only to cases in which plaintiff fails to file *Thulbana* for the first hearing.

Held further, that as a general rule, the Chief Court will not interfere on the revision

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Civil Procedure Code—(Continued).

side when the petitioner has another remedy, but it will do so in exceptional circumstances. **Shahabdin v. Anjama I-naumania**, 85 P. W. R. 1908.

CHEVIS, J.

(83-a) S. 100—See No. 78, *supra*.

(83-b) S. 101—See No. 78, *supra*.

(84) *Ss. 102 and 103* Suit for redemption dismissed for default—Fresh suit for the same barred.

If a mortgagor sues for redemption and his suit is dismissed under S. 102, *Civ. Pro. Code*, and he, thereafter, brings a fresh suit for redemption of the same mortgage, the cause of action in the second suit is the same as the cause of action in the first and is barred by S. 103 of the *Civ. Pro. Code* **Gurditta v. Narain Das**, 43 P.R. 1907=169 P.L.R. 1908

RATTIGAN, J.

References —15 C. 422 (P.C.), 117 P.R. 1891 and 32 P.R. 1905, *F.*, 10 B. 28, *D.*, 25 M. 90 (F.B.), 7 B. 467, 13 B. 567, 19 A. 202, *App.*, 86 P.R. 1877, 11 P.R. 1881, 6 M. 119, 7 M. 432, 11 A. 386 and 15 M. 366, *doubted*

(85) *Ss. 102, 103, & 117*—Suit, dismissal of, for absence of counsel—Counsel not able to appear—Return of brief by junior counsel—Practice

Ss. 102 & 103, Civil Procedure Code, (1882), do not apply when the plaintiff is present in Court, though the counsel whom he has instructed to conduct his case are not present when the case is called on for hearing. Under such circumstances, the Court hearing the case should proceed under S. 117 of the Code.

If there is a chance of neither of the two counsel briefed in a case being able to attend when the case is called on, one of them must return his brief in good time. In case of dispute, it is the duty of the junior to return the brief or to make arrangements for some other counsel to attend till he can come in. **Esmail Ebrahim v. Haji Jan Mahomed**, 10 Bom L.R. 1172

BASIL SCOTT, C.J. & BATCHELOR, J.

(86) *Ss. 102, 103, 157 & 158*—Pleader applying for adjournment—Effect.

In this case the hearing of the suit had been fixed for the 9th November. On that day, on the case being called on, the pleader for the several parties put in an application for adjournment on the ground that the parties and their witnesses had been prevented from

Civil Procedure Code—(Continued).

being present by the fever epidemic. An adjournment for one hour only was granted to enable the pleader for the plaintiffs to consider what course he should pursue. On the case being called on at 2 P.M., the pleader for the plaintiffs got up and left the Court. His name was called out and the names of the plaintiffs were also called out. The pleader had not stated that he had no instructions to proceed with the suit. The Judge dismissed the suit.

Held, that the order dismissing the suit was an order under Ss. 102 & 157 and not under S. 158 of the Code, and that the plaintiff's remedy was by an application under S. 103 of the Code. **Allahdino v Nawalmal**, 1 S.L.R. 224.

PRATT, J.C. and CROUCH, J.C.

(87) *S. 103—Dismissal of suit for default—Ground for dismissal order being set aside.*

The only ground on which, an order of dismissal of a suit for default, can be set aside in pursuance of the law as laid down in S. 103 of the Code, is that of the plaintiff's being prevented by any sufficient cause from appearing when the suit was called on for hearing. **A. L. A. R. Lakshmanan Chetty v. V. R. P. P. L. Yellayappa Chetty**, 4 L. B. R. 221.

HAETNOLL, J.

(88) *S. 103—Suit—Default of appearance—No appearance by counsel—Dismissal for default—Sufficient cause for default.*

When a suit was called on for hearing neither of the plaintiff's counsel was present, but the plaintiff was present in person. However, to enable them to come and appear, the defendant's counsel raised issues in the case. At the end of that time, the Court gave a limited time for the plaintiff to appear. The plaintiff's counsel did not turn up within the time allowed, whereupon the suit was dismissed. The plaintiff then applied, under S. 103 of the Civ. Pro. Code, for the restoration of the suit.

Held, that there was no sufficient cause for setting aside the order of dismissal (a). **Es-mall Ebrahim v Haji Jan Mahomed**, 10 Bom. L. R. 904.

RUSSELL, J.

References:—(a) 13 B. 12, followed and 26 M. 599, not followed.

(88-a) *S. 103*—See Nos. 2, 84, 85, and 86, *supra*.

(89) *Ss. 103, 311, 588 & 647—Appal from an order refusing to set aside the order dismissing an application for setting aside the sale in default.*

Civil Procedure Code—(Continued).

S. 647 is so worded as only to render provisions of procedure applicable and cannot be so read with S. 588, cl. 8, (a) as to confer, by implication, an indirect right of appeal, inasmuch as appellate jurisdiction cannot be created except by express language in an enactment.

No appeal, therefore, lies against an order rejecting an application, under S. 103, of the Civ. Pro. Code, for reviving an application, under S. 311, of the Code dismissed for default. **Musammatt Sobaran Kuar v. Ude' Sah**, 10 O.C. 353.

(GREENE, J. C.)

References —(a) 10 B. 433, 27 C. 414, 31 C. 207, & 11 M. 319, R.

(90) *Ss. 103 and 647—Application for revision—Dismissal for default—Power of Court to restore the application.*

Where an application for revision is dismissed for default of the petitioner, such petition can be restored by the Court under S. 103, C.P.C., by virtue of the provisions of S. 647 of the Code (a) **Jiwani v. Bhagel Singh**, 97 P. R. 1907—33 P. L. R. 1908.

CHATTERJI and JOHNSTONE, JJ.

References —(a) 109 P. R. 1882, Diss. 76 P. R. 1903, 75 P. R. 1881; 54 P. R. 1901 (F. B.); 14 C. 177, 62 P. R. 1894, R and D.

(91) *S. 108, hearing of application under, during pendency of appeal*

Where after preferring an application for setting aside an *ex parte* decree under S. 108, C.P.C., the defendant preferred an appeal against the decree

Held, that the first Court had jurisdiction to hear the application during the pendency of the appeal **Sarat Chandra Dhal v. Damodar Manra**, 12 C. W. N. 885.

Doss, J.

References —9 W. R. 301, 27 M. 602, R; B. L. R. F. B. R., p. 362, 35 W. Va. 384 = 14 S. E. 7, *Relied on*.

(92) *S. 108—Adjourned date of hearing—party not appearing—Filing written statement—Application to set aside decree.*

A defendant, after filing a written statement, failed to appear at any adjourned hearing and an *ex parte* decree was passed. *Held*, he can apply under S. 108 of the Code to set aside the decree. **Munlappan Chetty v. Balayan Chetty**, 4 M. L. T. 216.

SANKARAN NAIR and ABDUR RAHIM, JJ.

Civil Procedure Code—(Continued).

References :—18 M. L. J. 51, 23 C. 738, 20 B. 380, 20 A. 195, F.

- (93) *S. 108*—*Ex parte decree against a number of defendants—One defendant applying to set it aside—Decree set aside as against all defendants—Validity.*

The petitioner brought a suit to recover a certain sum of money from three persons personally and the managers of a devastanam, being revenue paid by him for the defendants. The defendants did not appear and the petitioner obtained an *ex parte* decree ordering the defendants personally and from the devastanam to pay to the plaintiff the amount claimed with interest and costs. The third defendant applied, under S. 108, C. P. C., to have the decree set aside, and the District Munsiff set aside the whole decree as against all the defendants.

Held, that the *ex parte* decree as against the defendants, other than the one who had shown sufficient cause within the meaning of S. 108, could not be set aside. **Yalla Konikkal Edathil Cherla Panji Achan v. Marutha Yeera Karyundam**, 4 M. L. T. 230.

MUNRO and ABDUR RAHIM, JJ.

References :—26 M. 604, 18 B. 142, 8 W. R. 260, 25 C. 155, 1 C. W. N. 456, 21 A. 383, R and Expl.

- (94) *Ss. 108 and 157*—*Suit decreed ex parte—Application for setting aside the ex parte decree—Whether at the stage of the hearing the suit was decreed ex parte.*

At the hearing of a suit, after the plaintiff closed his case, the defendant contested the whole case of the plaintiff, filed some documents himself and examined some witnesses. On the fourth day after the defence began, as some of the expected witnesses for the defence had not turned up, application for adjournment was made by defendant's Counsel. The case was adjourned for the next day, *first*, to enable the witnesses to attend, and *secondly*, if such witnesses did not attend, for a proper application, supported by affidavit, for adjournment being made. On the next day the application for adjournment was refused, and the suit was decreed *ex parte*. The defendant, without appealing against the order refusing adjournment, applied under S. 108, C. P. C., for setting aside the *ex parte* decree. *Held*.

Civil Procedure Code—(Continued).

Under the circumstances, the decree had not been passed *ex parte* and that the defendant was not entitled to apply under S. 108.

The defendant was not, however, without remedy if he was not satisfied with the order refusing adjournment. His course was by way of appeal against that order, and if the Appellate Court considers any further evidence necessary, it may direct that evidence to be taken, or possibly the defendant might, if in time, apply for a review. **Kader Khan v. Juggeswar Prasad Singh**, 35 C. 1023.

WOODROFFE, J.

- (95) *Ss. 108, 157 and 158*—*Defendants applying for adjournment after settlement of issues—Suit adjourned to a fixed day—Minor defendant applying for adjournment through Vakil—Refusal—Vakil informing Court that he has no instructions and abstaining from taking further part in case—Hearing of suit proceeded with, minor's guardian ad litem only being absent—Decree against both defendants—decree against minor whether ex parte.*

A suit against a father and his minor son, who was stated to have been adopted by the father's uncle, for the recovery of mortgage money, was, owing to alleged negotiations for a compromise, and on the request of the parties, finally adjourned, after the settlement of issues to the 26th June 1901. On the 24th June, the alleged adoptive mother of the 2nd defendant, being his guardian *ad litem*, presented a petition praying for two months' time to enable her to produce evidence on the 2nd defendant's behalf. On this petition being rejected, the vakil, who till then appeared for the 2nd defendant and who moved the application, informed the Court that he had no instructions and abstained from taking any further part in the suit. The case was proceeded with, the guardian *ad litem* of the 2nd defendant only being absent and a decree, including also the share of the 2nd defendant, (who had pleaded that, owing to his adoption, the mortgage was not binding on him to the extent of his interest in the land), was passed in favour of the plaintiffs. On the plaintiff's proceeding to execute, the 2nd defendant's guardian *ad litem* applied, under S. 108, C. P. C., to the District Judge, to have the decree set aside, who dismissed the application, being of opinion that the decree should be taken as on passed under S. 158, C. P. C.

Civil Procedure Code—(Continued).

Held, the case not being one in which time had been specifically granted to the 2nd defendant to produce his evidence or to cause the evidence of his witnesses or to perform some other act necessary to the further progress of the suit and the adjournment being an adjournment of the suit for the convenience of all the parties, that the ground taken by the District Judge in dismissing the petition was clearly unsustainable, that the action of the Court must be taken to have been under the first part of S. 157 of the Civ. Pro. Code, and that the latter part of S. 157 had absolutely no application to a case, like the present where the Court at once proceeded to trial and judgment (a).

Held, further, that the decree passed against the 2nd defendant must be held, under the above circumstances, to have been *ex parte*, although his pleader was present and applied for adjournment (b).

In cases where a pleader informs the Court that he has no instructions, it would be well explicitly to ascertain whether the pleader severs his connection with the case. **Ramanuja Reddiar v Ramaswami Aiyangar**, 3 M. L. T. 225—18 M. L. J. 51.

SUBRAHMANYA AYYAR, C. J. and RUSSELL, J.

References.—(a) 4 M. H. C. R. 56 and 254 G. M. H. C. R. 262 and 10 M. 270 R. (b) 22 A. 65 and 23 B. 111 R.

(96) *Ss. 108, 350 and 623—Insolvency proceedings—Ex parte order setting aside of Rule.*

S. 350 of the Civ. Pro. Code contemplates that on the date fixed for hearing, the Court shall examine the judgment-debtor in the presence of the persons on whom notice has been served or their pleaders. This should be strictly carried out.

If the objector had no notice of the application for insolvency, he is entitled to apply under S. 108 of the Civil Procedure Code to set aside an *ex parte* order passed under S. 350 of the Code, but if notice had been served on him and he was prevented by any sufficient reason from appearing and if the case was heard *ex parte* under S. 350, he is entitled to make an application under S. 623 of the Civ. Pro. Code, to set aside the *ex parte* order on the ground that it was in contravention of S. 350. **Mool Chand Ram v. Sarjoog Pershad**, 7 C. L. J.

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MOOKERJEE and HOFFMAN, JJ.

Civil Procedure Code—(Continued).

(97) *Ss. 108 and 562—Re-hearing—Remand of case—Trial on merits.*

In an application under S. 108, of the Civil Procedure Code, on the grounds of fraud and suppression of summons, the Munsiff rejected the application holding there was no fraud and no suppression. On appeal the District Judge passed the following judgment:

"This was an application under S. 108; Civil Procedure Code. After hearing arguments of pleaders, I am of opinion that this is a fit case for remand. Ordered accordingly that the appeal be allowed and the suit be remanded to the Lower Court for trial on merits."

Held, this was not a proper judgment. The case having been in fact tried on the merits, the District Judge had no jurisdiction to remand it, but should have come to a conclusion on the evidence. **Sonaulla Sarkar v. Beake Mandal**, 7 C. L. J. 379.

MIRZA and CASPIERISZ, JJ.

(98) *Ss. 108, 591—Rule discharged by High Court—District Judge—Power to re-open question—Order setting aside ex parte decree—Appeal, if open to attack on—Petition to High Court—Facts in judgment—Affidavit, if necessary.*

An *ex parte* decree was set aside under S. 108 of the Code of Civil Procedure by the Munsiff. A rule to set aside this order was discharged by the High Court. Subsequently on appeal from the final decree, the District Judge set it aside on the ground that the order under S. 108 was not proper.

Held, the District Judge had no jurisdiction to consider the propriety of the order, after the discharge of the rule by the High Court.

Held further.—It was not open to the plaintiff to challenge the validity of the order in an appeal against the final decree. S. 591 of the Code of Civil Procedure has no application to such a case (a).

Per Mookerjee, J.—Where the facts in a petition to the High Court appear sufficiently from the judgments of the lower Courts, no affidavit need be filed (b). **Mussamat Kariman v. A. H. Forbes**, 8 C. L. J. 908.

HARRINGTON and MOOKERJEE, JJ.

References.—(a) 22 C. 981 and 25 A. 280, F. (b) 32 C. 146, F.

Civil Procedure Code—(Continued).(98-a) S. 112—Sec.No. 78, *supra*.(98-b) S. 113—Sec No 78, *supra*.(98-c) S. 117—See No 85, *supra*.(99) S. 136, *scope of—Discretion—Defence when to be struck off.*

S. 136 of the Code of Civil Procedure is based upon Order 31, Rule 21 of the Supreme Courts in England. It renders the defendant liable to have his defence struck out upon failure to answer an interrogatory. It does not make it obligatory upon the Court to strike out the defence under all circumstances whatever (a)

If there is obstinacy or contumacy on the part of the defendants or a wilful attempt to disregard the order of the Court, an order under S. 136 of the Civil Procedure Code is appropriate. **Banshi Singh v. Palit Singh**, 7 C.L.J. 295.

MOOKERJEE and CASPERSZ, JJ.

References—(a) W.N. (Eng) 201, W.N. (Eng.), 229, W.N. (Eng.) 193, 34 L.T. 752, 5 C. 707—5 C. L. R. 509, 9 C. 923, R.

(100) Ss. 138, 139 and 584—*Documents not mentioned in list filed with plaint—Discretion of Court in excluding—Certified copies of public documents on record of judicial proceedings—Erroneous exclusion—Second appeal.*

When a plaintiff seeks to produce documents at the trial which he had failed to mention in the list annexed to the plaint, the Court has clearly a discretion under S. 139 of the Civil Pro. Code whether to receive or to reject them. But in exercising this discretion the Court has to bear in mind that the section was enacted to prevent fraud by the late production of suspicious documents and not to shut out formal evidence beyond suspicion such as certified copies of public documents or records of judicial proceedings (a)

When a subordinate Court has refused in the original exercise of its discretion to receive documentary evidence which ought to have been accepted, the High Court has ample power to interfere under S. 584, C. P. C. (b)

Unless called upon by the Court, it is not obligatory on the plaintiff to produce documents on which he relies but which he has not filed with the plaint, at the first hearing when issues are framed (c). **Talewar Singh v. Bhagwan Das**, 12 C. W. N. 312=8 C. L. J. 147.

• MOOKERJEE and CASPERSZ, JJ.

References—(a) 23 W. R. 29, 23 B. 173, re-

Civil Procedure Code—(Continued).

hed on, (b) 20 C. 740, 8 B. 377 & 8 M. 373, F', (c) 1 B. L. R. 120, 21 W. R. 42, F.

(100-a) S. 139—See No. 100, *supra*.

(101) Ss. 156 and 373—*Jurisdiction to pass order conditional upon payment of costs.*

A Court has no jurisdiction under S. 156 to pass an order conditional upon payment of costs, such as is provided in S. 373 of the Code. **Musthan Rowthar v. Natharsa Rowthar**, 4 M. L. T. 200

WALLIS, J.

(101 a) S. 157—See Nos. 86, 94, and 95, *supra*.

(102) S. 158—*Power of dismissing suit—Plaintiff adducing some evidence—Non service on some of Plaintiff's witnesses*

It is only under very exceptional circumstances, and when no other provisions of the Code are applicable to a case, that resort should be had to the very stringent provisions of S. 158 of the Civ. Pro. Code. Where four of the witnesses of the plaintiff were examined, it is not open to the Court to dismiss the suit under this section without taking into consideration the evidence on the record, simply because some of the plaintiff's witnesses who had been summoned to attend on the date of hearing were not served with notice. **Kartar v. Surasti**, 9 P. R. 1908=28 P. W. R. 1908=98 P. L. R. 1908.

SHAH DIN, J.

(102-a) S. 158—See Nos. 86, 95 and 102, *supra*.

(103) Ss. 165 and 181—*Burden of proof on defendant of proving plaintiff's adoption—adoptive father, though cited as witness, abandoned, by both sides—Defendant applying for examination of adoptive father after both sides had closed case—Application properly to be refused—Fairly in conduct of litigation—Best evidence—Evidence Act, Ss. 11 and 13.*

One Ramkaranji, when he was joint with his younger brother K and acted as *karta* of the joint family, conveyed, on 12-10-1908, to one Puri a portion of the joint property. In January, 1905, K sued to obtain possession of half the aforesaid share, claiming that the sale was void for want of consideration, and, in any case, could not bind him, as it was neither necessary nor beneficial to his interests. The defendant, *inter alia*, alleged that the plaintiff was adopted soon after October 1898 by one S.

Civil Procedure Code—(Continued).**Civil Procedure Code—(Continued).**

thereby losing all title to the property of his natural family. The defendant had the burden of proving that the plaintiff had been adopted by S. The general rule that the best evidence should be given required him to put the adoptive father into the box. But he deliberately closed his case without tendering S, though both sides had included S in their lists of witnesses. After the case was closed and was posted for judgment, the defendant applied for leave to examine S, who was present in Court. The first Court refused to examine S.

Held that S. 181, Civ. Pro. Code, had no application under the circumstances, that there was no reason whatever why the first Court should have exercised the power conferred on it by S. 165, Civ. Pro. Code, and that it was not bound to examine S. but exercised the discretion allowed in such matters, not only legally, but wisely (a). To countenance a manoeuvre of this sort would only lead to laxity in the conduct of litigation.

If a party wants a certain person examined, he must tender him for examination, and S. 181, Civ. Pro. Code, does not require a Court to examine a witness, simply because he may be present in Court (b).

It was objected, also, that the pleadings did not include an allegation that S, being a *nu-lung*, could not adopt, and that the first Court should not have relied on orders recorded in a suit not *inter partes*, showing that J, whom the defendant's witnesses described as having taken a prominent part in the adoption ceremony in 1900 or later, was already dead in April 1899, *held* that the fact that J died early in 1899 was relevant under S. 11 of the Indian Evidence Act, and, if he was treated as dead, in a civil suit to which he was a party, the Court's order was good evidence of a fact which might be proved otherwise (See S. 43 in the Indian Evidence Act). **Ramkrishna Puri v Kisangir**, 4 N. L. R. 129.

DRAGL-BROCKMAN, J. C.

References —(a) 2 Ch. 172, R; (b) 6 W. R. 281 and 13 W. R. 185, F.

(103-a) S. 174—See No. 82, *supra*.

(103-b) S. 179—See No. 47, *supra*.

(104) Ss. 179 and 180—Examination of defendant as witness for plaintiff at the very outset of the case, propriety of. See *REG JUDICATA*, No. 7, 116 P.W.R. 1908.

(104-a) S. 180—See Nos. 47 and 104, *supra*.

(104-b) S. 181—See No. 108, *supra*.

(105) Ss. 191 & 198—Suit tried partly by one Judge and partly by another—Preliminary order before completion of evidence—Findings of former Judge.

This suit was tried in the District Court partly by one Judge and partly by another. In a preliminary order the first Judge came to certain findings and directed that after certain evidence had been taken with regard to the mortgage of the lands the final decree should take a certain shape. The Judge who finished the case disagreed with his predecessor and gave a different decree to that ordered by the first Judge.

Held, that the order of the first Judge did not have the force of a decree and that it was the decision of the second Judge that decided the suit, and that it was that decree that was appealable, and not the order of the first Judge. **Ma Nyo v. Ma Yauk**, 4 L. B. R. 256.

FOX, C. J., and HARNOLD, J.

(105-a) S. 198—See No. 105, *supra*.

(106) Ss. 198, 202 and 375—Compromise—Judgment—Time for its dating and signing—Parties can compromise both before and after judgment is delivered—See *COMPROMISE*, No. 1, 67 P.W.R. 1908.

(107) S. 199—Judgment, written after Judge was transferred—Validity—Judgment reversed too long.

A Judge who heard the evidence in the case is entitled, under S. 199 of the Code of Civil Procedure, to write his judgment and send it to his successor for delivery, although the judgment was written by him after he left the judicial post which he was occupying when he heard the case. (a). **Satyendra Nath Roy Chowdhuri v. Srimati Thakurani Kastura Kumari Ghatwalin and anr. and Lala Brij Behari Sahai v. Srimati Thakurani Kastura Kumari Ghatwalin**, 12 C.W.N. 682. (F.B.)—7 C.L.J. 666=4 M.L.T. 33=35 C. 756.

MACLEAN C. J., RAMPINI, BRETT, MITRA and DOSS, JJ.

References :—(a) 11 C.W.N. 501, 84 C. 293, approved; 7 Bom. L. R. 951, 9 W.R. 1, and 17 W.R. 475, R.

(107-a) S. 202—See No. 106, *supra*.

(108) Ss. 202 and 623—Judgment—Clerical errors—Review not necessary.

Civil Procedure Code—(Continued).

When inadvertently wrong words are used in a judgment in describing the property in suit, the corrections may be made on an application under S. 202 of the Civ. Pro. Code and an application for review* is not necessary to do so. **Mula Ram v. Barhmi**, 40 P.L.R. 1908=49 P.W.R. 1908.

CHATTERJI, J.

(109) S. 206—*Partition suit—Preliminary order for partition—Final decree—Appeal—In appeal both can be questioned—Practice—Pleadings.*

It is open to an appellant, in an appeal against the final decree in a partition suit, to question the correctness of the preliminary order or decree for partition when no appeal was preferred against such order within the time allowed by law (a).

It is not open to an appellate Court, to make out a new case for the first time in appeal contrary to the pleading, in the first Court. **Mulla Abdul Hal v. Khatija Begam**, 10 Bom. L.R. 514.

CHANDAVARKAR and HEATON, JJ.

Reference :—(a) 29 C. 758, F.

(110) S. 206—*Limitation for application under section—Power of High Court to interfere in revision where the lower Court declined to correct a clerical error.* See LIMITATION, No. 10, 11 O. C. 208.

(110-a) S. 206—See No. 301, *infra*.

(111) Ss. 206, 208 & 259—*Construction of decree—What is specific movable property—Execution of decree against the judgment-debtor admittedly not in possession of the property—See DECREE, No. 4, 60 P.W.R. 1908.*

(111-a) S. 208—See No. 111, *supra*.

(112) S. 211—*Mesne profits—Khamar land—Interest.*

In determining the amount of mesne profits payable in respect of *Khamar* land, 5 per cent., on the value of the actual produce was held to be a sufficient allowance to meet the costs of supervision and any other incidental charges, for which a proprietor, who is not an ordinary cultivator of his *Kamar* land, may be liable.

Principle upon which mesne profits of *Khamar* land should be assessed discussed.

Interest as forming a part of the mesne profits or damages cannot be allowed for any period subsequent to that limited by S. 211, C. P. C.

Civil Procedure Code—(Continued).

Interest at 6 per cent., and not 12 per cent., was allowed on mesne profits after possession was delivered. **Ijatulla Bhuyan v. Chandra Mohan Banerjee**, 12 C.W.N. 285=7 C.L.J. 197.

MITRA and CASPEREZ JJ.

(113) S. 211—*Mesne profits awardable after institution of suit.*

Under S. 211, C. P. C., mesne profits can be granted from the date of the institution of the suit only up to three years from the date of the decree, although the party dispossessed may recover possession in execution beyond the said period. The words "*whichever event first occurs*" should be construed strictly. **Trilokya Nath Roy Chaudhuri v. Jogendra Nath Ray**, 35 C. 1017.

MACLEAN, C. J., & DOSS, J.

References.—23 A. 152=27 I. A. 209, 24 B. 149, (*Ibid*) 345, F.

(114) Ss. 213, 259 and 276—*Lis pendens—Money-decree against the estate of a deceased debtor—Claim for mere money-decree not an administration suit—Mortgage by lien—Rights of decree-holder and mortgagee.*

The creditor of a deceased person obtained a decree for money payable by instalments against his assets in the hands of his son and heir, the defendant in the case. Pending the appeal by the plaintiff, the defendant mortgaged the property in suit which belonged to the deceased debtor to satisfy the claim of another creditor of the deceased. The plaintiff contended that the mortgage was invalid having been made pending the disposal of his case and that he could sell the property free from the mortgage lien.

Held, that the decree obtained by the plaintiff not being a decree binding the property, and his suit not being one in the nature of an administration suit, the mortgage was not invalid, and the plaintiff could sell the property only subject to the mortgage. **Baghu Mal v. Pat Ram**, 52 P.L.R. 1908.

JOHNSTONE and KENSINGTON, JJ.

References :—C. 402, D; 7 A. 122, 9 C. 406, 29 M 508, 26 A. 28, *Appr*; 19 A. 504, 8 C. 20, 370, *disapproved*.

(115) Ss. 213, 295, 490, 622 and 618—*Attachment prior to judgment—Application for rateable distribution—Order by District Judge.*

Civil Procedure Code—(Continued).

When there has been an attachment before judgment, the attaching creditor is entitled to a ratable share, under S. 295, and no fresh application after decree and before realization is necessary (a). Under S. 648, C. P. C., even property outside the jurisdiction of the Court in which a suit is pending can be attached by that Court in anticipation of its judgment (b).
Amara Veerayya v Anumala Chetti Pichayya, 4 M. L. T. 318

ABDIR RAHIM, J.

References.—(a) 19 M. 72, R. (b) 7 C. W. N. 216, R.

(116) S. 215 A—Provisions imperative—Partnership accounts, examination of—Preliminary decree for dissolution is a condition precedent—See **Partnership**, No. 7, 100 P. W. R. 1908.

(116-a) S. 215 A—Preliminary decree—Appeal against such decree—Court Fees. See **Court Fees Act**, No. 2-a, 150 P. R. 1908

(117) —, under S. 223, Court has power on application of decree-holder, to transmit decree to another Court for execution—See **Execution of Decree**, No. 3, 17 M. L. J. 616

(118) Ss. 223 and 248—Practice—Notice—Application for transmission of decree—Execution—Court which should issue notice.

The notice under S. 245 of the Code of Civil Procedure may be served by the Court to which the decree is transmitted for execution and not necessarily by the Court which passed it and to which an application is made for transmission under S. 223 of the Code

The Court has a discretion whether or not it will issue a notice before ordering transmission.

Ordinarily, in a case like the present, it should be left to the Court to which the decree is to be transmitted to issue the notice.
Raja Sreenath Roy v. Romesh Chandra Acharayya Chandhuri, 12 C. W. N. 897.

WOODROFFE, J.

(119) Ss. 223, 617, 25—Decree passed by a Court of Small Causes—Attachment and sale of immovable property—Decree sent for execution to Munsiff—Appeal—Ss. 27 and 35, Provincial Small Causes Courts Act.

A decree passed by a Court of Small Causes sought to attach and sell immovable property and was, therefore, sent for execution to the Munsiff's Court under S. 223, Code of Civil Procedure. Application having been made for

Civil Procedure Code—(Continued).

execution in the Munsiff's Court, the judgment-debtor raised certain objections which were overruled.

Held, that the appeal lay to the District Judge, neither the suit nor the execution proceedings having been transferred to the Munsiff's Court, but the decree having been sent under S. 223 of the Code. Had the suit or the execution proceedings been transferred to the Munsiff's Court under S. 25 of the Code or the execution proceedings instituted in the Munsiff's Court under S. 35, Provincial Small Causes Courts Act, the proceedings held in the Munsiff's Court might be regarded as proceedings held by a Court of Small Causes. S. 27 of the Small Causes Courts Act has no application to a case of this kind. **Atwari v. Maiku**, 5 A. L. J. 612—A. W. N. (1908) 251.

STANLEY, C. J., and BANERJI, J.

(120) S. 230—Execution of decree—Limitation—Decree for money.

A decree for recovery of money by sale of specific property is a decree for money within the meaning of S. 230 of the Civ. Pro. Code.
Ram Gopal v. Teja Singh, 121 P. L. R. 1908.

ROBERTSON, J.

References.—28 M. 224 and 473, F. 16 A. 418, 25 A. 541, 24 C. 473, 25 C. 580, 27 C. 285, not F.

(121) S. 230—Agreement under S. 257-A—Order sanctioning such agreement—Whether order is a fresh decree or old order for payment of money—Mistake of Law—Res-judicata—Limitation

An order sanctioning a compromise cannot be said to be either a new decree, or an old order subsequent to decree directing the payment of money, within the meaning of S. 230 (b), Civ. Pro. Code (a).

Where an order proceeded on a mistake of law such a mistake cannot operate as *res-judicata* in a subsequent proceeding, which in no way affects the operation of the previous order (b).
R. M. P. L. Palaniappa Chettiar v. Raja Vinayathana Vijaya Kumara Bangaru Tirumalai Svari Naidoo, 4 M. L. T. 233.

WALLIS AND MUNRO, JJ.

References.—(a) 14 M. L. J. 359, R.; (b) 30 M. 461 and 504, L.

(122) S. 230—Absolute prohibition imposed by section against granting of application after

Civil Procedure Code—(Continued).

12 years from certain dates—S. 19 of Limitation Act cannot affect such prohibition—See **EXECUTION OF DECREE**, No. 18, 11 O.C. 220.

(123) S. 230 (a)—Appeal by some of the defendants against portion of decree—Appeal dismissed—Limitation for executing remaining portion of decree—See **LIMITATION ACT**, No. 129, 32 P.R. 1907.

(124) S. 232—*Sale of property, the subject of a decree—Right to execute the decree.*

The sale of property for the possession of which the vendor has obtained a decree, does not, necessarily, carry with it the right to execute the decree.

The vendor obtained a decree for possession of certain property. He sold portions of the property to the respondents who applied for execution of decree, *held* that no application could legally be made to execute the decree under S. 232 of the Civ. Pro. Code. **Hansrajpal v. Mukhraji**, 4 A.L.J. 759 = A.W.N. (1907), 280 = 30 A. 28.

KNOX, AC.J. and RICHARDS, J.

(125) S. 232—Application by transferee decree-holder for recognition by Court—Application not returned for amendment as not in accordance with S. 232, C.P.C.—Presumption—See **LIMITATION ACT**, No. 134, 18 M.L.J. 24.

(126) S. 232—Power of Courts to which decree was transferred to grant permission to continue execution proceedings begun upon the application of a decree-holder since deceased—See **EXECUTION OF DECREE**, No. 10, 11 O.C. 112.

(127) S. 232, cl. (b)—*Decree for money—Assignment in writing—Transfer to one of the judgment debtors—Execution proceedings by the transferee—Contribution suit.*

It was directed by a decree that N should pay Rs. 90 and Rs. 11-5-3 as costs and A should pay Rs. 30 with Rs. 3-12-4 as costs. A afterwards took a transfer of the decree to him by an assignment in writing and applied to execute it against N to the extent of the Rs. 90 and the Rs. 11-5-3. The application was rejected on the ground that it came within cl. (b) of S. 232 of the Civ. Pro. Code.

Held that the decree for money so far as it related to the Rs. 90 and costs was not a decree against several persons but against one person that is N, and so far as that part of the decree was concerned, the transfer did not fall within cl. (b) of S. 232 of the Civ. Pro. Code.

Civil Procedure Code—(Continued).

The purpose of cl. (b) of S. 232 of the Civ. Pro. Code was not to deprive the transferee of a decree who might happen to be one of the judgment-debtors of all relief, but to impose upon him the duty of proceeding by what was considered a more appropriate procedure, that is, a suit for contribution. **Anant Vinayak v. Nagappa Subraya**, 10 Bom. L. R. 89 = 3 M.L.T. 175 = 32 B. 195.

JENKINS, C. J., and BAILEY, J.

(128) Ss. 232 and 233—Sale of mortgaged property by transferee of money-decree from the mortgagee—Validity—Applicability of S. 99 of the Transfer of Property Act—See **TRANSFER OF PROPERTY ACT**, No. 34, 17 M.L.J. 503 = 3 M.L.T. 107.

(129) Ss. 232 and 368—*Application by transferee of decree to bring in defendant's representative on record—Limitation Act, Art. 179 cl. 4—Step in aid of execution.*

There is nothing in S. 232 of the Code to prohibit the transferee of a decree, from applying for and obtaining an order, under S. 368 of the Code, to bring in the representatives of a defendant on record. Such an application is a step in aid of execution. **Mahalinga Moopanar v. Kuppanchariar**, 17 M.L.J. 485 = 3 M.L.T. 21.

BRANSON and WALLIS, JJ.

(130) Ss. 232 and 619—*Execution, application for, where to be made—Transfer of jurisdiction—Court which passed the decree.*

The expression "the Court which passed the decree" in S. 232, C.P.C., includes the Court which, by reason of a transfer of jurisdiction, has jurisdiction in respect of the subject-matter of the suit.

S. 649, C.P.C., should, if possible, be so construed as to make it convenient to parties to execute their decrees, the decree-holders as well as the judgment-debtors. **Udit Narain Chowdhury v. Mathura Perhad Mahata**, 12 C.W.N. 859.

MINRA and BELL, JJ.

(130-a) S. 233—See No. 128, *supra*.

(130-b) S. 234—See No. 153, *infra*.

(131) Ss. 234 and 244—*Judgment debtor's death—Suit for administration by judgment-creditor against executor—Mal-administration.*

Civil Procedure Code—(Continued).

Certain persons, who had obtained a decree against a person, since deceased, failed to realise the decretal amount by executing the decree against the executrix of the judgment-debtor. They then instituted a suit against the executrix, charging her with mal-administration and asking for administration of the judgment-debtor's estate.

Held, that the suit involved a much wider question than one merely relating to the execution of the decree, and was not barred by S. 244 of the C P Code (a) **Saratmani Debi v Batta Krishna Banerjee**, 12 C. W. N. 614.

MACLEAN, C. J., and CONL, J.

References —(a) 21 C. 473, 11 B. 727, P.

(132) Ss. 234 and 372—*Simple money-decree—Trustee pendente lite—Transferee could not be brought on regard as legal representative in execution.*

Where a person having certain transactions with the Rice Mill of Arbuthnot & Co., at Tiruvalur, obtained a simple money-decree thereon against them, and pending the suit Arbuthnot & Co., transferred the Tiruvalur mill with all assets and liabilities to Arbuthnot's Industrials of which they were to be the managing agents and in execution proceedings, it was sought to execute the decree against Arbuthnot's Industrials, substituting them on the record as the legal representatives of the first Company, *held* that this could not be done as S. 234 or S. 372, C P C had no application. **The Arbuthnot's Industrials, Ltd v A. M. Muthu Chettiar and A. M. O. Muthu Chettiar v. Partick Macfayden**, 1 M. L. T. 190.

BENSON and MUNRO, JJ.

References —30 C. 961, P. 23; C. 374, 16 C. 40, D.

(132-a) S. 244—*Execution of decree—Suit between decree-holder and judgment-debtor—Competency of Court executing decree to stay execution pending suit*

A Court, to which a decree is transmitted for execution, has power to act under S. 243, C P Code, and has jurisdiction to stay proceedings under that section in execution of the former decree, until a suit pending in that Court between the judgment-debtor and the decree-holder is decided. **Bhagvan Kaur v. Gajindar Singh**, 130 P. R. 1908.

RATTIGAN, J.

References —6 N. W. P. 281, 7 A. 73 and 10 A. 389, R.

Civil Procedure Code—(Continued).

(133) S. 244—*Decree for delivery of possession of equity of redemption—Wrongful delivery of land, instead of equity of redemption—Suit by mortgagee for restitution of land so delivered—Application of S. 244.*

S. 244 bars a regular suit, where the question relating to execution of a decree is raised *bona fide*. But when the decree itself is, on the face of it, wholly irrelevant to the question raised, and the wrong-decree takes the plea of bar to shield his unlawful gain secured even against the express orders of the executing Court, possibly in collusion with the officer executing the decree, and in the absence of the judgment-debtor, S. 244 would seem to have no application. So, where a person sued to enforce his right of pre-emption, in a property subject to mortgage, and got a decree directing delivery of possession of the equity of redemption therein but, in execution of the decree, the Patwari delivered possession of the property itself, instead of the equity of redemption, a regular suit by the mortgagee, claiming restitution of the property so wrongfully delivered cannot be said to be barred by S. 244, as the question raised in the suit does not relate to the execution, discharge or satisfaction of the decree (a). Even if there were any room for doubt on this point, the plaintiff may be treated as an applicant for execution of decree for claiming restitution of lands wrongfully delivered by the Patwari in executing the decree (b). **Karam Chand v. Khuda Bakhsh**, 5 P. R. 1907 = 10 P. W. R. 1907 = 23 P. L. R. 1908.

TAI CHAND, J.

References —(a) 11 W. R. 516, P. (b) 22 C. 433, 22 A. 121, 28 M. 64, 32 C. 332, P. 5 M. 391, 7 M. 255, 23 M. 55, 16 N. 287, 4 M. 285, 12 W. R. 85, 11 W. R. 39, 12 B. 449, 9 A. 229, 8 C. W. N. 353, 9 P. R. 1889, 63 P. R. 1901, 45 P. R. 1901, R.

(134) S. 244—*Decree for permanent injunction—Lands purchased from decree-holder by another person—Vendee bringing a fresh suit for injunction.*

The plaintiff's predecessor-in-title obtained a permanent injunction restraining the defendants from obstructing the former in his right of way. After the decree, the plaintiff became the purchaser of the property with reference to which the right of way was enjoyed. He was again obstructed by the defendants in using the way: and so plaintiff filed a suit against them. The lower Courts held that

Civil Procedure Code—(Continued).

the plaintiff's remedy lay in executing the decree and not in filing a fresh suit.

Held, there was no bar to the plaintiff's suit, inasmuch as the injunction did not run with the land. **Jammedji Manekji Kotwal v. Haria Daya**, 10 Bom. L.R. 18=3 M.L.T. 139=32 B. 181.

JENKINS, C J, and BATCHELOR, J :

(135) *S. 244—Auction-purchaser—Trespass by judgment-debtor, decree-holder and other persons—Suit by purchaser for compensation not barred by S. 244.*

The plaintiff purchased a *peramb* in Court auction and the sale was confirmed but before he obtained possession, the decree-holder and judgment-debtor joined with other persons and carried away some of the materials of a building standing upon the land. *Held*, that a suit for compensation against all these persons, who were joint wrong-doers, was not barred by S. 244, Civ. Pro. Code, as the question between the parties was not one relating to the execution of the decree. **Kolintavita Antathodan Mama Amina v. Kolintavita Muyyarikandi Bevachi Haji**, 17 M.L.J. 543=3 M.L.T. 97=31 M. 37.

MILLER, J.

(136) *S. 244—Purchaser under decree of puisne mortgagee obtaining possession of mortgaged property—Subsequent purchase under decree on the first mortgage—Suit for possession by subsequent purchaser—Redemption.*

A puisne mortgagee obtained a decree against the mortgagor without impleading the first mortgagee, and bought the property in execution of his mortgage-decree, and also obtained possession thereof.

The first mortgagee then sued on his mortgage and bought the property in execution of his own mortgage-decree. The first mortgagee afterwards sued the puisne mortgagee, and claimed that the puisne mortgagee should either give up possession or redeem him.

Held, that the suit was not barred by S. 244, C.P.C. (a).

In order that S. 244, Civ. Pro. Code, should apply, two conditions must be fulfilled—

(a) the question must relate to the execution, discharge or satisfaction of the decree, or stay of execution thereof;

(b) the question must arise between parties to the suit or their representatives.

Civil Procedure Code—(Continued).

In the present case the question at issue arose only after the satisfaction of the original decree, and it was not between parties to the same suit or their representatives, but between representatives of the same party.

Held, also, that, the defendant being a puisne mortgagee, his only right was to redeem the plaintiff (b). He was not concerned with the account taken in the plaintiff's suit to which he was not a party, nor was he concerned with the price paid by the plaintiff at his purchase. **Thakurdas wd. Mulchan v. Gangaram wd. Tolaram**, 1 Sind. L.R. 172.

PRATT and HAYWARD, JJ.

References—(a) 25 B. 631 (b) 20 B. 390 19 A. 527 and 33 C. 590, B.

(137) *S. 244—Purchaser at execution sale—Whether representative of judgment-debtor.*

Auction-purchase, at a sale held in execution of his decree on a second mortgage is liable, under S. 244 C.P.C., to be joined as a representative of the judgment debtor, by the first mortgagee decree-holder in execution of his decree **Gokalsing Suratsing v. Awatmal Sobhanmal**, 1 Sind L.R. 158.

LUCAS and HAYWARD, JJ.

(138) *S. 244—"Representative," who is—Beneficial owner*

A person, for whom the predecessor of the judgment debtors was the *benamidar* and who is, therefore, really interested in protecting the property, is a "representative" of the judgment debtors within the meaning of S. 244 of the Civil Procedure Code.

The word "representative" has a wide import, and includes not only heirs and executors, but also assignees or legal representatives in the strict sense of the words, that is, persons interested in saving the property from being sold, and whose interest would be jeopardized if the sale were not set aside. **Shibkumar Lal Panday v. Maidhur Gazi**, 7 C.L.J. 299.

MITRA and CASPERSZ, JJ.

(139) *S. 244—Execution of decree—Question as to representative capacity of persons sought to be made parties to proceedings in execution.*

A Hindu widow mortgaged property which had been of her husband in his life-time. The mortgagees sued for and obtained a decree for sale and an order absolute for sale against the mortgagee. The mortgagee died before execu-

Civil Procedure Code—(Continued).

tion, and the decree-holders then applied to bring on to the record as her representatives the reversionary heirs of the judgment-debtor's husband. These persons resisted the application upon the ground that they were not the legal representatives of the widow, and the lower appellate Court decided that they were not and dismissed the decree-holders' application for execution.

Held that, inasmuch as the reversionary heirs had repudiated the notion of their being legal representatives of the mortgagor from the outset and established to the satisfaction of the Courts that they were not such representatives, the order of the Court was correct. **Khuman Singh v. Makhan Singh**, A.W.N. (1908), 93=5 A.L.J. 555.

STANLEY, C.J., and BURKITT, J.

Reference :—21 A. 277, D.

(140) *S. 244—Question relating to the execution, discharge or satisfaction of the decree—Contest between the holder of a decree for an undivided share of joint property and an auction-Purchaser pendente lite.*

One Wilayat Begam obtained a decree for possession of a share in certain joint and undivided zamindari property, and this decree was executed so far as might be by delivery of former possession. While the suit in which this decree was passed was pending, one Raghunath Das obtained a simple money-decree against another co-sharer in the zamindari and in execution thereof brought the property to sale and it was purchased by Nand Kishore. Nand Kishore got possession. Wilayat Begam applied for partition of her share, but was resisted by Nand Kishore, and accordingly instituted a suit against Nand Kishore praying for a declaration of her title against him. *Held* that such a suit was not obnoxious to the prohibition contained in S. 244 of the Code of Civil Procedure. **Wilayat Begam v. Nand Kishore**, A.W.N. (1908), 93=30 A. 231—5 A.L.J. 547.

STANLEY, C.J., and BURKITT, J.

References :—26 A. 147, D; 28 A. 722 & L.R. 6 Ch. D. 160, R.

(141) *S. 244—Purchaser at Court auction whether representative of decree-holder.*

Purchaser at Court auction, who did not purchase from the decree-holder, and did not derive title from him, is not a representative of the decree-holder within the meaning of S. 244, Civ. Pro. Code. **Krishna Satapathi v.**

Civil Procedure Code—(Continued).

Saraswatula Sambasiva Row Pantulu, 3 M. L. T. 306=31 M. 177.

WHITE, C. J., and MILLER, J.

References :—14 C. 644, F; 28 M. 87, D; 30 M. 507, Diss.

(142) *S. 244—Execution of decree—Sale of immovable property—Purchased by decree holder—Suit to obtain possession by assignee of auction-purchaser—Practice—Full Bench reference—Bench not constituted—Powers and duties of a Divisional Bench.*

Where in execution of a simple money decree certain property was sold and purchased by the decree-holder himself, and where after the confirmation of the sale the decree-holder failed to obtain possession of the property purchased, and it remained in the hands of the judgment-debtor, *held*, that a suit by an assignee of the decree-holder for possession of the purchased land was barred by S. 244, Code of Civil Procedure (a).

Semle.—A division Bench of the High Court made a reference to the Full Bench, but the Chief Justice refused to constitute a bench to hear the reference. *Held* that the division Bench could re-hear the case. **Bhani Mal v. Mokkhan Lal** 5 A.L.J. 285=A.W.N. (1908), 122.

KNOX and AIKMAN, JJ.

Reference :—(a) 3 A L.J. 234, F.

(143) *S. 244—Appeal—Order refusing to grant a sale certificate—Decree-holder, auction purchaser—Party—Execution, relating to.*

No appeal lies against an order refusing to grant a certificate of sale to the decree-holder, auction-purchaser, the question determined being not one relating to the execution, discharge or satisfaction of the decree (a).

The auction-purchaser being also decree-holder is a party to the suit within the meaning of S. 244 of the Civil Procedure Code (b). **Jagannath Marwari v. Kartick Nath Pandey**, 7 C.L.J. 436.

HILL and RAMPINI, JJ.

References :—(a) 1 C.W.N. 658, applied; (b) 18 A. 36, not followed and 27 C. 34, followed.

(144) *S. 244—Order made pursuant to an appellate decree by a subordinate Court, whether appealable.*

An order made pursuant to an appellate decree by a subordinate Judge is an order made

Civil Procedure Code—(Continued).

in execution and so appealable. **Prayaga Doss Jee Yaru, Mahant v. Tirumallia Anandam Pillai Purasa Srinanga Charulu Yaru**, 4 M.L.T. 92 = 81 M. 406.

BENSON and WALLIS, JJ.

Reference :—17 M. 343, F.

(145) **S. 244—Mortgage under the judgment-debtor, whether representative of the judgment-debtor.**

A person who claims as a mortgagee under the judgment-debtor must be regarded as a representative of the judgment-debtor for the purpose of S. 244. **C. P. C. Kukkil Kurunakaram Nair v. Panoikkat Narayana Nambi**, 4 M.L.T. 85.

WALLIS and MUNRO, JJ.

Reference :—17 M.L.J. 321, F.

(146) **S. 244—Official Assignee—Disallowance of claim of Official Assignee to have proceeds of sale in execution of decree against insolvent judgment-debtor paid to him—Appeal.**

Held that, the Official assignee not being the representative of an insolvent judgment-debtor no appeal would lie against the disallowance of his claim to have the proceeds of a sale in execution of a decree against an insolvent judgment-debtor paid over to him. **Grey, Official Assignee v. Hazari Lal**, A.W.N. (1908), 203 = 5 A.L.J. 553.

RICHARDS and GRIFFIN, JJ.

References :—7 A. 752; 21 B. 205 and 22 C. 259, R.

(147) **S. 244—Representative—Auction-purchaser at sale in execution of decree against transferee of occupancy holding—Decree against recorded tenant.**

The purchaser at an auction held in execution of a decree against the unregistered transferee of an occupancy holding is a 'representative' of the recorded tenant within the meaning of S. 244, Civ. Pro. Code, and is entitled to apply for the setting aside of a sale in execution of a rent decree against the recorded tenant, on the ground of fraud (a). **Haradhan Rakshit v. Grish Chandra Mukherji**, 8 C.L.J. 327 = 13 C. W. N. 98.

CASPERSZ and SHARFUDDIN, JJ.

Reference :—(a) 24 C. 62, F.

(148) **S. 244—Power of Court to correct its own mistake—Inherent power—Amendment**

Civil Procedure Code—(Continued).

of sale certificate—Sale certificate including a property not sold.

A Court committing a blunder has power to rectify it of its own motion.

Where two properties were advertised for sale and one property was sold but the sale certificate included both the properties and the purchaser got possession of both;

Held that the Court had inherent power to rectify the mistake by amending the sale certificate and to direct that the delivery of possession of the second property be cancelled;

That the matter would also come under S. 244, C.P.C., the question being one between the decree-holder and the judgment-debtor and relating to the satisfaction or discharge of the decree. **Gobinda Chandra Chanda v. Abhoy Charan Bagchi**, 12 C.W.N. 1027.

MITRA and CASPERSZ, JJ.

(149) **S. 244, whether bars the trial of an issue involved in the questions mentioned in the section—Issue raised at the instance of a defendant in a suit brought against him.**

The effect of S. 244, Civ. Pro. Code is to debar a plaintiff from bringing a suit for the determination of a question relating to the execution, discharge, or satisfaction of a decree which has arisen between himself and the defendant as parties to the suit in which the decree was obtained, but not to debar a defendant from setting by way of defence a matter which relates to the execution, discharge, or satisfaction of a decree obtained in a suit to which he and the plaintiff were parties. All that S. 244 enacts is that certain questions therein specified shall be determined by the order of the Court executing the decree and not by separate suit; the section bars a suit brought for the determination of certain questions, but does not bar the trial of any issue involved in those questions, if the issue is raised at the instance of a defendant in a suit brought against him. **Yenkataramanachariyal, v. Meenakshisundaramaier**, 4 M. L. T. 285.

WHITE, C.J. and DAVIES, J.

References :—24 C. 355 and 26 C. 946, F.

(150) **S. 244—Reversioners brought on record as Hindu widow's representatives—Competency to object in execution—Suit.**

A decree was passed against a Hindu widow. On her death the reversioners to her husband were made parties to the decree. They objected to the execution on the ground that the

Civil Procedure Code—(Continued).

debt was contracted without legal necessity. Their objections were overruled and they filed the persent suit. *Held*, that the suit was not barred by the provisions of S. 244, Civil Procedure Code, inasmuch as they could not contend in execution proceedings that the mortgagor was not competent to make the mortgage. **Jagarnath Singh v. Shiv Ghulam Singh**, 5 A. L. J. 745

STANLEY C. J., & BANERJI, J.

Reference —21 A. 277, P.

(151) S. 244—Applicability of section to case where judgment-debtor tries to set aside effect of decree—Mortgage-decree directs sale of property—Objection to sale that property belonged, not to judgment-debtor, but stranger—Such question to be tried in regular suit, not execution proceedings. See **HINDU LAW (WILL)**, No 4, 8 C.L.J. 26.

(152) S. 244—Execution of decree—Decree nisi—Decree absolute—Transfer of Property Act, S. 93. See **EXECUTION OF DECREE**, No 24, 10 Bom. L.R. 1057.

(152-a) S. 244—See No. 131, *supra* and Nos. 172, 206 and 207, *infra*

(153) Ss. 244 and 244—Questions arising in execution—Legal representatives of debtor—Decree-holder—Sons of a deceased Hindu debtor can raise questions of illegality or immorality of their father's debt, in execution proceedings—Separate suit, not permissible—Limitation Act (XV of 1877), Art. 179—Appeal by some of the defendants—Limitation on dastkhast against defendants who have not appealed.

There is no substantial distinction in regard to questions arising in execution, between the position of legal representatives added as parties to the suit before decree and legal representatives brought in after decree under S. 244 of the Civ. Pro. Code (Act XIV of 1852). All questions between them and decree-holder relating to execution must alike be disposed of under S. 244 of the Code.

Where the sons of a deceased Hindu debtor are added as legal representatives in the course of a suit and before the decree is pronounced, it is open to them to dispute in execution proceedings the liability of the ancestral properties for the debt of their father on the ground that the debt was tainted with immorality or illegality. They cannot insist on the decree-holder resorting to a fresh suit to enforce their pious

Civil Procedure Code—(Continued).

obligation as Hindu sons to satisfy the debt out of the ancestral properties, because the question having arisen in execution proceedings between the decree-holder and themselves as parties to the suit, a separate suit is rendered inadmissible by the provisions of S. 244 of the Civ. Pro. Code, 1852.

Where only some of several persons affected by a decree have appealed against it, the date of the appellate decree forms the basis from which the period of limitation, under Art. 179 of the Limitation Act, should be computed, even in the case of those who have not appealed against the original decree. **Shivram Dhondu Pujara v. Sakharam Krishna Kulkarni**, 10 Bom. L.R. 939.

BASIL SCOTT, C.J., and HEATON, J.]

(154) Ss. 241 and 256—Adjustment between mortgagor and mortgagee after order absolute for sale has been passed—Competency of Court to deal with the matter—See **TRANSFER OF PROPERTY ACT**, No 58, 12 C.W.N. 282.

(155) Ss. 244, 258—Payment twice over—Suit for recovery of that amount—Maintainable

Ss. 244 and 258 of the C.P.C., do not preclude the institution of a suit by a judgment-debtor for recovery of money, which he had paid to the decree holder privately and the payment of which, not being certified, could not be recognised, and for which the decree-holder had taken out execution over again (a). **Gendo v. Nehal Kunwar**, 5 A.L. J. 475—A.W. N. (1908), 220.

STANLEY, C. J., and BANERJI, J.

References —(a) 3 A. 538, 21 M. 409, F.

(156) Ss. 244 and 278—Personal decree against shebait—Execution against debutter property—Suit to declare property debutter's maintainable.

A suit instituted by the shebait of an idol to have it declared that property sought to be sold in execution of a personal decree against the plaintiff is the endowed property of the idol is maintainable. **Amar Chand Kundu v. Nani Gopal Mukerjee**, 12 C.W.N. 308.

RAMPINI, C.J. and SHARFUDDIN, J.

Reference —6 C.W.N. 663, F.

(157) Ss. 244 and 278—Decree, personal, against shebait—Claim to attached property on behalf of idol, if may be tried in execution proceedings.

Civil Procedure Code—(Continued).

When immovable property is attached in execution of a decree passed against a *shewan* personally, the latter can object to the attachment on the ground of the property being *disbutter* and the claim is triable under S. 244 of the Civ. Pro. Code. **Jogendra Nath Sirkar v. Gobinda Chandra Dutta**, 12 C.W.N. 310—35 C. 364—7 C.L.J. 537.

MACLEAN, C.J., and COXE, J.

Reference.—17 C. 711, F.

(158) Ss. 244, 278 and 283—*Property attached in execution claimed as trust property—Procedure for investigating claim—Appeal—Wakf, whether decree for sale of, valid.*

Where a judgment-debtor or his representative opposed an execution on the ground that he held the property in trust for some third person or body of persons or a religious charity or institution, *held*, that S. 244 did not apply to the case, that the claim must be investigated, under Ss. 278 to 283, C.P.C. and that the order passed thereon cannot be challenged by an appeal, but must form the subject of a separate suit (a).

A decree for the sale of 'wakf' property may in certain circumstances be perfectly valid. **Budruddin Sahib v. Abdul Rahim**, 18 M.L.J. 21—3 M. L. T. 325—31 M. 125.

BODDAM and MUNRO, JJ.

References.—(a) 23 B. 237, F., 23 M. 195, F., 30 M. 26, R. (b) 26 M. 31 and 28 M. 81, *held inapplicable.*

(159) Ss. 244 and 285—Court of higher grade causing property to be put up for sale in execution of lower Court's decree—Legality—Appeal—See EXECUTION OF DECREE, No. 12, 11 O. C. 41.

(160) Ss. 244 and 318—*Right to sue for possession—Auction purchaser.*

An auction purchaser of the property in execution of his decree or his legal representative cannot maintain a suit for possession, S. 244 of the Civ. Pro. Code, being a bar to the suit. **Sheo Narain v. Nur Muhammad**, 5 A. L. J. 20—A. W. N. (1908), 12 = 30 A. 72.

STANLEY, C. J. and BURKITT, J.

References.—27 C. 34, 26 M. 740, 3 A. L. J. 234—26 A. W. N. 87, F.; 4 A. L. J. 434—29 A. 463, *reversed.*

(161) Ss. 244 and 583—*Applicability of S. 244 to proceedings under S. 583—Restitution of property—Execution of decree.*

Civil Procedure Code—(Continued).

S. 244 does not apply in its entirety to proceedings had under S. 583 for restitution of property taken in execution of a decree, which is reversed in appeal. **Matiram Marwari v. Ramkumar Marwari**, 35 C. 265.

MITRA & CASPERSZ, JJ.

References.—10 M. I. A. 203, 9 W. R. 402; 4 C. 625, 33 C. 857, R.

(162) S. 248—Application for execution of decree—Issue of notice—Date of the order—Limitation. See LIMITATION ACT, No. 137, 5 A. L. J. 524.

(163)—S. 248, execution application, though defective, containing prayer for issue of notice under—Saving of limitation—See LIMITATION ACT No. 133, 18 M. L. J. 14.

(163-a) S. 248—See No. 118, *supra*.

(164) Ss. 248 and 260—Application for execution of decree—Notice issued to judgment-debtor in execution of application not in accordance with law—Application for arrest of judgment-debtor after expiry of three years from the date of decree—Limitation—See LIMITATION ACT, No. 126, 125 P. L. R. 1908.

(164-a) S. 252—See No. 115, *supra*.

(165) S. 253—*Surety for performance of decree after it had been passed, liability in execution of—Security.*

S. 253 of the Code does not apply to a person who gave security for the performance of the decree after it had been passed. **Bhola Singh v. Bhabhuli Singh**, 11 O. C. 342.

CHAMBER, J.C., and EVANS, A.J.C.

References.—7 O.C. 210, 25 B. 409, 19 A. 247, R.

(165-a) S. 253—See No. 334, *infra*.

(165-b) Ss. 253, 336—*Surety, liability of.*

When a surety gives security under S. 336 for the appearance of, or payment by, a person arrested in execution of a decree for money, he can be proceeded against on default in execution proceedings. **Guran Ditta v. Pala Singh**, 113 P. R. 1908.

REID, J.

Reference.—109 P. R. 1906 (F. B.) *Appl*

(165-c) S. 256—See No. 154, *infra*.

(166) S. 257-a.—*Execution of decree—Agreement varying or satisfying decree.*

Held, by the Full Bench, ROBERTSON, J., *dissentiente* (overruling 88 P.R. 1904), that agreements under S. 257 A of the Code are not void

Civil Procedure Code—(Continued).

for all purposes, but merely for the purpose of execution.

Per ROBERTSON, J.—That the provisions of S. 257 A, second part, are of general application, and not restricted to operations in the execution of the decree only to which the agreements in question refer. **Atma Singh v. Banke Rai**, 61 P.L.R. 1907 (F.B.)=71 P.W.R. 1907=29 P.R. 1908.

CLARK, C.J., REID, CHATTERJI, RATTIGAN,

LAL CHAND and ROBERTSON, JJ.

(167) S. 257-a.—*Rent decree—Instalment bond executed by some of the judgment-debtor's in decree-holder's favour in respect of decretal amount—Enforcement by suit—Agreement to give time.*

Where two of the judgment debtors executed a *kustubundi* bond in favour of the decree-holder hypothecating certain property in order to secure the decretal amount, and the bond further provided that, on failure of payment of the instalments, the decree-holder would be competent to execute the decree:

Held, that it was more than a mere agreement to give time within the meaning of S. 257 A. Civ. Pro. Code, and although the agreement to give time, not having had the sanction of the Court, was incapable of enforcement, there was nothing to taint the rest of the agreement with illegality or prevent the decree-holder from suing upon it. **Beichambers v. Sarat Chandra Ghose**, 12 C.W.N. 674=7 C.L.J. 543=35 C. 870.

MACLEAN C.J., and DOSS, J.

(168) S. 258.—*Payment out of Court—Duty of decree-holder receiving payment—Failure to certify payment to Court—Suit by judgment-debtor to recover amount—Damages.*

The law casts on a decree-holder receiving payment of the judgment-debt out of Court, the duty of certifying such payment in satisfaction of the decree; and if he fails to do so, there is a breach of that duty. This implies that a cause of action accrues when the judgment-creditor fails to fulfil his duty in the matter (a).

So, where a judgment debtor remitted money by Post Office Order, which was received by the decree holder who failed, however, to certify receipt of the amount and enter satisfaction in Court, it was held, that a suit would lie to recover the amount so paid, as damages, by reason of the defendant's failure

Civil Procedure Code—(Continued).

to certify it to the Court. **Medal Thalavoi v. Kallam Anni**, 3 M.L.T. 15=30 M. 545.

SUBRAMANIA IYER, J.

References :—(a) 5 M. 397 (F.B.) *F. Referred* Case No. 9 of 1905 Madras (Unreported) *Not F.*

(169) S. 258.—*Adjustment of decree—Part adjustment—Certificate, whether necessary.*

Where there is a money decree against two defendants, an agreement discharging one of them is an adjustment in part of the decree, and so requires to be certified (a). **Mahomed Mahomed Khan Bahadur v. Mahomed Munawar Sahib**, 4 M.L.T. 229.

WALLIS and MUNRO, JJ.

References :—(a) 22 B. 463, *expl*; 15 M.L.J. 370, *R.*

(170) S. 258.—*Application for execution of mortgage decree—Payment out of Court not certified, whether can be recognised—See TRANSFER OF PROPERTY ACT, No. 54, A.W.N. (1908), 103.*

(171) S. 258.—*Manager of a joint Hindu family certifying payment of a decree in favour of himself and minor members—Power of Court to demand security from manager—See HINDU LAW (JOINT FAMILY), No. 12, 11 O.C. 246.*

(171-a) S. 258—*See No. 155, supra.*

(172) Ss. 258 and 244.—*Satisfaction of decree not certified owing to decree-holder's fraud—Application after time to have certified.*

S. 258, of the Civ. Pro. Code, prevents an executing Court from taking cognizance of an uncertified adjustment of a decree (a).

Where, however, the judgment-debtors complained that the decree-holder had by fraud kept them in ignorance till, within a month of their application, of the fact that the satisfaction of the decree had not been certified;

Held—That the matter could be investigated under S. 244 of the Civ. Pro. Code. **Gadahar Panda v. Shyam Churu Naik**, 12 C.W.N. 485.

RAMPINI and SHARFUDDIN, JJ.

References :—(a) 8 C.W.N. 395=31 C. 480, *Expl*; 20 C. 32, 15 M. 302, *F*; (b) 19 C. 688, *F*.

(172-a) S. 259—*See No. 111, s.*

(172-b) S. 260—*See No. 164, supra.*

(173) S. 266.—*Arrears of rent—Suit by auction-purchaser.*

Civil Procedure Code—(Continued).

Arrears of rent due under a sub-lease, which, under the contract, were made payable to the lessor's Zemindar, constitute a debt, due to the lessor, which is liable to attachment and sale, under section 266 of the Code of Civil Procedure. **Lachhmi Narain v. Kalyan Das**, 5 A.L.J. 265 = A.W.N. (1908) 129.

STANLEY, C.J. and BURKITT, J.

(174) S. 266—Execution of decree—Attachment—Right to attach profits not yet due.

Held, that a mere right to receive profits, the profits in question not having yet accrued due, is not susceptible of attachment in execution of a decree (a). **Sher Singh v. Sri Ram**, A.W.N. (1908), 101 = 5 A.L.J. 251 = 1 M.L.T. 10 = 30 A. 246.

AIKMAN and KARAMAT HUSEIN, JJ.

References.—(a) 27 C. 38, 28 C. 483, 11 M.I.A. 40; 27 L.J.Q.B.D. 234, 11 Q.B.D. 518, R.

(175) S. 266—Execution of decree—Attachment—Mortgage—Right of mortgagor in respect of mortgage money promised but not paid.

Where money promised as a loan by a mortgagor is not advanced in full, the mortgagor is only entitled to recover, if anything, damages for non-payment of the balance he cannot sue for specific performance of the agreement to lend the full sum promised, and the non-payment of a portion of the loan does not constitute a debt which can be the subject of attachment and sale under section 266 of the Code of Civil Procedure. **Phul Chand v. Chand Mal**, A.W.N. (1908) 105 = 5 A.L.J. 491 = 30 A. 252.

STANLEY, C.J. and BURKITT, J.

Reference.—1898 A.C. 309, R.

(175-a) S. 266—Attachment and sale of Toda Giras allowance—What interest in the allowance is attachable—Act VII of 1887 (Bombay), S. 5—See TODA GIRAS ALLOWANCE, No. 1, 10 Bom. L.R. 1201.

(176) Ss. 266 and 617—Attachment—Sale—Country liquor—Collector's permission—Abkari Act (Bom. Act V of 1878), S. 16—Reference to High Court—Action by a third person not a party to the suit.

Country liquor is not exempt from attachment and sale in execution of a money decree passed by a Civil Court. It is saleable property, and is covered by the first part of S. 266 of the Code.

Civil Procedure Code—(Continued).

The Collector's permission is necessary to the sale of country liquor (S. 16 of the Bombay Abkari Act), but it is not necessary to attach-ment so far as the attachment can be made without removal.

A reference to the High Court under S. 617, C.P.C., is not bad, merely because it arises out of the action taken by a third person not a party to the suit. **Purshottam Narayan Joglekar v. Balvant Babaji Gurav**, 10 Bom. L.R. 13 = 3 M.L.T. 135 = 32 B. 157.

JENKINS, C.J. and HEATON, J.

(177) Ss. 272 and 470—Running of interest stopped. See CONTRACT ACT, No. 1, 4 M.L.T. 335

(178) Ss. 274, 295—Execution proceedings—Attachment by different decree holders—Attachment See ATTACHMENT, No. 1, 81 P.R. 1908

(179) Ss. 274 and 314—Sale proclamation—Sentence should be in every part of the property—Value, statement of, if material—“Property.”

The statement in the sale proclamation of a value which proves to be inadequate is an irregularity but not a material irregularity. Such statements are made without much consideration and it is well-known that purchasers do not take serious notice of any statement in the sale proclamation as to the value of the property to be sold.

S. 274 of the Civ. Pro. Code, does not require that the sale-proclamation should be served in each of the villages comprised in the property to be sold. The word “property” in that section evidently refers to each “lot” to be sold separately from the rest.

Though it is a sound rule to follow, i.e., to serve a separate proclamation in each of the villages embraced in the same process when they are at such a distance from one another that there is no moral certainty of communication to persons on or interested in the one of what is publicly done on the other, the fact, that the processes were not served in each does not necessarily constitute an infringement of the provisions of S. 274, Civ. Pro. Code (a) **Moulvi Abdul Kashem v. Benode Lal Dhone**, 12 C.W.N. 758.

MITRA and CASPERSZ, JJ.

References.—(a) 11 C. 74 and 12 B. 368, commented on.

Civil Procedure Code—(Continued).

(180) *S. 276—Plaintiff deriving his title both from judgment-debtor and judgment-creditor—Attachment of judgment-debtor's property—Subsequent transfer of same property to plaintiff by judgment-creditor—Release by the plaintiff of the latter right—Estoppel.*

Plaintiff derived his title to certain property both from the judgment-debtor and from the judgment-creditor. But he released, his rights derived from the judgment-creditor, reserving the rights derived from the former.

It was held that the transfer by the judgment-creditor impliedly warranted that he had a good title to the property, and that the plaintiff, having accepted a title on the footing that the title under the execution-proceedings was good, was consequently estopped from disputing such title.

It was also held that, under the provisions of S. 276, Civ. Pro. Code, the plaintiff acquired no rights under the transfer from the judgment-debtor which could prevail against the attachment, and that his reservation of those rights gave him no title as against the parties who claimed by sale from the judgment-creditor, **Maryadi Appala Narasiah v. Sri Rajall Yyri-cherja Yeerabhadra Raju Bahadur Garu**, 3 M.L.T. 295.

WHITE, C. J. and SANKARAN NAIR, J.

(181) *S. 276—Validity of alienation by judgment-debtor before order of attachment is served upon him.*

The property of the judgment-debtor was attached, but, before the order of attachment had been intimated to the judgment-debtor, the judgment-debtor alienated the same to the plaintiff.

Held, the alienation was not void as against the auction-purchaser, inasmuch as all the conditions prescribed by S. 276, C.P.C., were not complied with. **Totomal, son of Tilokchand v. Raising, son of Manghermal**, 1 Sind. L. R. 176.

PRATT and CROUCH, JJ.

(182) *S. 276—Easement enjoyed by dominant tenement expressly released after latter attached under a decree—Alienation of portion of that property within meaning of section—Transaction void.* See EASEMENTS, No. 4, 12 C.W.N. 969.

(182-a) *S. 276—Father's power to alienate ancestral property—Attachment of son's share in the property—Prohibition of alienation under*

Civil Procedure Code—(Continued).

S. 276 Father's right to deal with the share—See HINDU LAW (DEBTS), No. 9, 10 Bom. L. R. 1206.

(182-b) *S. 276—See No. 114, supra.*

(183) *S. 278—Order dismissing application made under S. 278 of the Code for default—Order passed without an investigation—Applicability of Art. 11 of the Limitation Act—See LIMITATION ACT, No. 43, 17 M.L.J., 554=3 M. L.T. 106.*

(184) *S. 278—Suit for declaration of title to attached property—No application for removal of attachment under S. 278, C. P. C.—Suit not barred—See SPECIFIC RELIEF ACT, No. 10, 4 L.B.R. 263.*

(184-a) *S. 278—See Nos. 156 to 158, supra.*

(185) *Ss. 278, 280 and 281—Claim to attached property—Questions for determination—Possession—Constructive possession—meaning of "possessed" and "possession." See EXECUTION OF DECREE, No. 22, 4 L.B.R. 289.*

(186) *Ss. 278 and 283—Objection dismissed for default, effect of.*

Held, that an order disallowing a claim under S. 278, Civ. Pro. Code, for want of prosecution is conclusive unless a suit is brought under S. 283 within one year from the date of the order (a). **Gayadin v. Musammat Baij Nathi**, 11 O. C. 180.

CHAMBER, C.J.

References — (a) 1 C.W.N. 24 not F'; 15 C. 521, 20 W.R. 345, 21 W.R. 409, 24 W.R. 411 32 C. 537, 19 A. 253 and 22 B. 875, *ff.*

(187) *Ss. 278, 283 and 617—Jurisdiction—Appeal—Declaratory suit by objector against the decree-holder and judgment-debtor—Valuation of suit for purposes of jurisdiction and course of appeal.* See JURISDICTION (GENERAL), No. 1, 74 P.W.R. 1908.

(187-a) *S. 280—See No. 185, supra.*

(188) *S. 281—Order against judgment debtor conclusiveness of—Whether section can be availed of by person not a party to proceedings.*

An order, under S. 281, is not conclusive as against the judgment-debtor unless he is a party to the proceedings in which the order was passed, (a) and cannot be availed of by a person who was not a party to the proceedings. **Yadappalle Narsimham v. Dronamarju** See

Civil Procedure Code—(Continued).

tharamamurthy, 18 M.L.J. 26 = 3 M.L.T. 256 = 81 M. 163.

WHITE, C.J. & WALLIS, J.

References :—(a) 13 M. 365, 25 M. 721, 30 M. 95 (F.B.), F; 18 A. 413, R.

(188-a) S. 291—See No. 185, *supra*.

(189) S. 283—*Claim to attached property—Burden of proof.*

A decree-holder attached certain property of his judgment-debtor. The latter's daughter put in a claim in respect of the property, alleging a sale to her by the judgment-debtor. It was not proved by her, that she had been in possession at the time of the attachment. The sale also appeared to be collusive and fictitious.

Held, the burden of proving that the sale was genuine, and supported by consideration, and that the property belonged to the plaintiff and that the same was in her possession at the time of the attachment, lay upon her. **Ma Sein U. v. A L.Y.R.R.M. Letchmanan Chetty**, 4 L. B.R. 228.

HARTNOLL, J.

References .—2 L.B.R. 152, D; 12 B. 270, F.

(190) S. 283—*Suit for declaration of title by person whose objections to execution have been disallowed—Burden of proof.*

Held that a party intervening in the execution department, and failing in his objections to an attachment, and consequently being obliged to bring a suit under S. 283 of the Code of Civil Procedure, must give *prima facie* evidence to establish the genuineness of the document upon which he relies (a). **Nannhi Jan v Bhuri**, A.W.N. (1908), 125 = 30 A 321 = 5 A. L. J. 601.

STANLEY, C.J. and KARAMAT HUSAIN, J.

References :—(a) A.W. N. (1887) 71, A.W.N. (1889) 220, 18 A. 369 and 12 B. 270. F, 8 A. 178 discussed.

(191) S. 283—*Suit under—Burden of proof.*

When an objection preferred under S. 278 of the Code of Civil Procedure is disallowed and the objector institutes a suit, he is bound to lay some evidence to satisfy the Court that the document under which he claims represents a *bona fide* and genuine transaction and the burden does not lie upon the defendant in the first instance to give evidence in proof of the fraudulent and collusive nature of such document (a). **Nannhi Jan v Bhuri**, 5 A. L. J. 358.

STANLEY, C.J. & KARAMAT HUSAIN, J

Civil Procedure Code—(Continued).

References :—(a) A. W.N. (1887) p. 71; A.W.N (1899), p. 223; 18 A. 369; 12 B. 270; 8 A. 178; R.

(192) S. 283—*Crops of insolvent debtor attached by decree-holder—Claim to crops allowed—Right of suit by decree-holder—Whether Official Assignee a necessary party.*

Where the decree-holder has attached the property of an insolvent, but another person has successfully claimed the property, the decree-holder has a statutory right of suit to establish his right by instituting a suit under S. 283 of the Code. The Official Assignee is not a necessary party to such a suit. The decree-holder, however, after the judgment debtor's insolvency, is not entitled to a decree declaring the property liable to be attached, but he is entitled to a decree declaring that the property is that of the judgment-debtor. **Annapurni Ammal v. Subramanian Chettiar**, 4 M.L.T. 197 = 31 M. 347.

WALLIS and MUNRO, JJ.

References .—17 M.L.J. 618, R and F; 3 B. 438, D.

(193) S. 283, suit under, finding sale, to purchasers of mortgagees' right in certain land, inoperative—Purchasers, whether entitled to recover money paid for decree against mortgagee to save property from sale. See CONTRACT ACT, No. 24, A.W.N. (1908), 59.

(194) S. 283, suit under—Stamp on the plain—See COURT FEES ACT (VII of 1870), No. 16, 7 C.L.J. 36.

(195) S. 283—Whether person claiming to be the owner of an attached property has a right of suit independent of section 283, Civ. Pro. Code. See SALE, No. 2, 14 Bur. L.R. 135.

(196) S. 283—Wrongful seizure of movable property through Court by attachment—Sale and distribution of proceeds—Suit for refund of money paid—Suit barred—Limitation Act, Arts. 20, 36, 49, 62 and 120—Time spent in litigating title under S. 283, Civ. Pro Code, not made allowance for. See LIMITATION ACT, No. 50, 4 M.L.T. 271.

(196-a) S. 283—See No. 158, 186 and 187 *supra* and No. 351, *infra*.

(196-b) S. 285—See No. 159, *supra*.

(197) S. 287, cl. (c)—*Execution sale—Sale-proclamation—Statement of value—Inquiry as to approximate value when to be made.*

Civil Procedure Code—(Continued).

It cannot be laid down generally that in no case should any inquiry be made as to the value of the judgment-debtor's property to be sold before issuing the sale proclamation (a).

Where the decree-holder stated the value of the property to be Rs. 15,000, but the judgment-debtor objected that the value was Rs. 1,50,000 and the Court adopted the former valuation without any inquiry, *held*, that in the face of the discrepancy in the value as stated by the decree-holder on the one hand and the judgment-debtor on the other, an inquiry as to the approximate value of the property was obviously necessary and should be held. **Saurendra Mohan Tagore v. Hurruk Chand**, 12 C W. N. 542.

WOODROFFE and HOLMWOOD, JJ.

Reference.—(a) 31 C 922, commented on. (198) *Es.* 287, 622—*Appeal from order not appealable, treated as application for revision under S. 622—Order transgressing decree—Effect.*

Though an order is not appealable, an appeal from it can, in a proper case, be treated as an application for revision under S. 622, and the High Court can interfere with the same in such revision.

A decree ordered all the property to be sold, and the question of the lots into which it was to be divided and the order in which they were to be sold was reserved for consideration when the proclamation should be settled. *Held*, that an order which purported to be under S. 287 and which directed the order in which the shares of the judgment-debtors were to be sold, was a judicial order not warranted by the section under which it purported to be made. It was one passed *ultra vires*. **Krishnaswamier v. Swaminadhar**, 4 M L T. 352.

MILLER and PINHEY, JJ.

Reference.—27 M. 259

(198-a) S. 298—See No. 201, *infra*.

(199) S. 294—*Decree—Execution—Auction sale—Decree-holder, bidding for property with permission of Court—Right to set off.*

The first paragraph of S. 294 of the Civ Pro Code requires the permission of the Court to enable the holder of a decree to bid for property. If he gets that permission and gets it without qualification, then the amount due on the mortgage may, if he so desires, be set off. But it may be one of the terms on which permission to bid is granted that there should not

Civil Procedure Code—(Continued).

be this right of set off; in such a case, no set-off can be allowed. **Fazarlmal Fakirchand v. Namdev Rakhmajji**, 10 Bom. L.R. 296=39 B. 379.

JENKINS, C.J. AND BATCHELOR, J.

(200) S. 295, order under, whether Chief Court would interfere with, under S. 70 (1) (a) of the Punjab Courts Act, 1884.

In this case, the petitioners asked for the revision of an order under S. 295 of the Code, and the question had to be decided whether the Chief Court could interfere on the revision side, another remedy being open to the petitioners under the penultimate clause of the above section. *Held*, it is not the practice of the Chief Court to interfere on the revision side, in exercise of its extraordinary jurisdiction, under the Punjab Courts Act, with an order under S. 295 of the Code, save in exceptional circumstances clearly warranting such interferences. **Fazal Din v. Narain Singh**, 128 P.R. 1906=119 P.L.R. 1908.

JOHNSTONE & HURRY, JJ.

References.—65 P. R. 1905, 82 P. R. 1905, 21 P. R. 1902 & 76 P. R. 1902, R.

(200-a) S. 295—*Rateable distribution—Meaning of "against the same judgment-debtor"—New ground taken in appeal.*

The words "against the same judgment-debtor", in S. 295, C P C., do not include the judgment-creditor of the judgment-creditor against whose property rateable distribution is claimed. Where a decree-holder claimed rateable distribution in the lower Court, he will not be allowed before the Appellate Court to shift his ground and contend that he was a prior attaching-creditor and so entitled to the whole sale-proceeds. **Ellusah v. Rupp Ranganayyan**, 18 M. L. J. 562.

WHITE, C. J., and SANKARAN NAIR, J.

(200-b) S. 295—See Nos. 115 & 178, *supra*.

(201) *Ss.* 306 and 293—*Execution of decree—Sale in execution—Non-payment by purchaser of deposit required by law—Fresh sale—Claim by auction-purchaser for difference of price on re-sale.*

Certain immovable property was put up to auction in execution of a decree and purchased by A. B., but the purchaser did not at once make the deposit required by section 306 of the Code of Civil Procedure, and the property was subsequently—but not "forthwith"—put again to auction and sold for a considerably

Civil Procedure Code—(Continued).

less sum to the decree-holder. *Held* that the first sale was not merely irregular, but no sale at all (a), and that the second purchaser was not against the purchaser entitled to claim first under section 293 of the Code, compensation for the loss resulting on the second sale. **Amir Begam v. The Bank of Upper India, Limited**, A.W.N. (1908), 107 = 5 A. L. J. 836 = 30 A. 273.

STANLEY, C.J., and BURKITT, J.

Reference :—(a) 5 A. 316, F.

(202) S. 310 A—Application to set aside rent sale—Bengal Tenancy (Amendment) Act (I of 1907), S. 54—Bengal General Clauses Act (I of 1899), S. 8, cl. (c)—Right accrued previous to, but application after, repeal.

A raiyati holding having been sold on the 7th May, 1907, in execution of a rent-decree, an under-raiyat applied to have the sale set aside under S. 310-A, C.P.C., on the 23rd May following.

Held,—that the application could not be entertained, the Bengal Tenancy (Amendment) Act I of 1907 having come into operation on the 22nd May, 1907.

S. 54 of the amending Act, by enacting that S. 310-A, C.P.C., shall not apply to a tenure or holding attached in execution of a decree for arrears due thereon, does not repeal any portion of the Bengal Tenancy Act within the meaning of sub-sec. (c) of S. 8 of the Bengal General Clauses Act. **Asiuddi Mondol v. Mukhodamoyee Dassi**, 12 C.W.N. 434 = 35 C 543.

MACLEAN, C.J., and COX, J.

(203) S. 310 A—Decree attached by two persons—sale by one attaching creditor—Deposit to set aside sale—Title to deposit.

Defendant No. 1 obtained two decrees against Defendant No. 2; Plaintiffs also obtained a decree against Defendant No. 2 who had obtained a decree against a third person; Defendant No. 1 attached that decree and was substituted for defendant No. 2 on the 16th July 1904, Plaintiffs also attached that decree and were substituted in place of Defendant No. 2 on the 18th November 1904. Then at the instance of Defendant No. 1 (in execution of the attached decree) properties were sold and the sale was set aside by a deposit under S. 310 A, C.P.C.

Held that upon the terms of S. 310 A.C.P.C., both Plaintiffs and Defendant No. 1 were entitled to the money deposited. **Upendra Nath Sahu v. Hari Das Mukherjee**, 12 C.W.N. 800.

MACLEAN, C.J., and DOSS, J.

Civil Procedure Code—(Continued).

(204) S. 310-A—Beneficial owner, if entitled to apply—'Person whose property has been sold.'

A beneficial owner is entitled to apply under S. 310-A for the setting aside of a sale in execution of a decree for money against the benamidar. He is a person whose property has been sold under the decree (a). **Baburam Mandar v. Ram Sahai Sahoo**, 8 C.L. J. 305.

HARRINGTON AND MOOKERJEE, JJ.

References —(a) 23 B. 450, 7 C.W.N. 243, 26 M 365 and 20 C. 418, D; and 1 C.W.N. 135, F.

(205) S. 310 A—Sale of the immovable property in execution—Deposit by stranger in the name of judgment-debtor to set aside sale—Order setting aside sale reversed on appeal—Right of decree-holder to attach the deposit money.

Where, property belonging to the Defendant No. 2 having been sold in execution of a decree, he entered into an agreement with Defendant No. 1 under which the latter deposited the decretal amount under S. 310-A of the Code in the name of Defendant No. 2, the latter agreeing that, if the sale was set aside, he should sell the property to defendant No. 1; and the sale was set aside and the sale by Defendant No. 2 to Defendant No. 1 was also effected as agreed.

Held, that, on the Appellate Court setting aside the order under S. 310 A and confirming the sale, it was not open to the decree-holder to attach the money deposited as Defendant No. 2's money, and Defendant No. 1 was entitled to withdraw the same from Court.

Sobha Ram Dass v. Moheshwar Sarma, 13 C. W.N. 100.

COXE & DOSS, JJ.

(205-a) S. 310-A—See No. 3, *supra*.

(206) Ss. 310-A & 244—Deposit to set aside a sale-purchaser of a portion of an occupancy holding, right of, to make the deposit—Sale of the holding for its own arrears—Transferability of the holding—Appeal, if lies against an order reversing an order setting aside a sale.

The purchaser of a portion of an occupancy holding, whether it is transferable by custom or not, is entitled to make a deposit under S. 310-A of the Civil Procedure Code to set aside a sale (a).

The question whether the purchaser of a portion of an occupancy holding is entitled to

Civil Procedure Code—(Continued).

come in under S. 310-A of the Civil Procedure Code to make a deposit and to have a sale held for its own arrears set aside is one that comes under cl. (c) of S. 244 of the Code and an appeal and a second appeal lie in the case (b) **Omar AHMajhi v. Moonshi Basirudeen Ahmad**, 7 C. L. J. 282.

MITRA AND CASPERSZ, JJ.

References:—(a) 8 C. W. N. 55 & 232, *F*, (b) 28 C. 78 & 9 C. W. N. 134, *R*.

(207) *Ss. 310-A, 244 and 588—Question relating to the execution, discharge or satisfaction of a decree—Appeal—Auction purchaser representative of judgment-debtor not of decree-holder.*

A purchaser at an auction sale in execution of a decree is the representative of the judgment debtor, not of the decree-holder (a).

Where, therefore, a judgment-debtor's application under section 310-A of the Code of Civil Procedure had been allowed, it was held that no appeal by the auction purchaser, would lie, inasmuch as no appeal was given by section 588, nor did the case fall within the purview of section 244 of the Code (b). **Anandi Kunwari v. Ajudhr Nath**, A. W. N. (1908). 157 = 5 A. L. J. 557 = 30 A. 379.

AIKMAN AND GRIFFIN, JJ.

References:—(a) 30 M. 507, *Diss.* (b) 19 A. 140 *F*; 27 A. 263; 26 A. 447, 25 B. 631 & 7 A. 681, *F*; 29 A. 275, *Diss.*

(208) *Ss. 310 A, 312, 588 and 612—Order under S. 312—Revision.*

An order under S. 312, C. P. C., or one refusing to set aside a sale under S. 310 A, C. P. C. is appealable under S. 588 of the Code, and a revision petition to the High Court does not lie from such order in the first instance. **Yemba Pillai v. Marudaya Pillai**, 4 M. L. T. 96.

MILLER, J.

References:—30 M. 507, *R*.

(209)—S. 311. irregularity in publishing sale to be dealt with under—See TRANSFER OF PROPERTY ACT, No. 68, A. W. N. (1908), 49.

(209-a) S. 311—See Nos. 89 and 179, *supra* and No. 360, *infra*.

(210) *Ss. 311, 312 and 244 (c)—Execution of decree—Absence of notice to the judgment-debtor—Proclamation of sale—Sale at an undervalue—Application to set aside sale—Dismissal—Appeal against order of dismissal.*

Civil Procedure Code—(Continued).

An application seeking to have a sale set aside, on the ground that no notice had been issued to the applicant in the matter and that, in consequence, the property was sold at an undervalue, does not fall within the purview of S. 311 of the C. P. C., 1882; and an order dismissing the same is not covered by S. 312 of the Code. The order falls under S. 244 (c) of the Code, and is appealable as a decree.

The non-issue of notice to a party concerned is not a material irregularity in publishing or conducting the sale under S. 311 of the C. P. C., 1882. It is rather an irregularity in proceedings which are anterior to the publishing or the conduct of the sale.

The words "publishing or conducting" in S. 311 of the Code refer respectively to the proclamation of sale under S. 287 and to the action of the officer by whom the sale was held.

The circumstance that the decree has already been executed does not make S. 244 (c) of the Code inapplicable, where the question involved is none the less a "question relating to the satisfaction of the decree (a)." **Parashram Hanmanta v. Balmukund Lachiram**, 10 Bom. L. R. 752.

BATCHELOR and CHAUBAL, JJ.

Reference:—(a) 26 C. 539, *R*.

(211) *Ss. 311, 312 and 588 (16)—Application of judgment-debtor for sale dismissed for default—Further application for review dismissal of—Right of appeal—Order in resale without fresh proclamation, validity of.*

Where, in execution of a decree, an auction sale was confirmed under S. 312 in the absence of objection under S. 311, and an application made thereafter to set aside the sale was dismissed for default and, thereupon, another application was made on behalf of the judgment-debtor asking (a) that the dismissed application be restored or (b) that this be treated as a fresh application to set aside the sale or (c) that this be treated as an application for review, but was also rejected, no appeal lies against either of the orders of dismissal, inasmuch as they do not come either under S. 588 (16) or under S. 312.

The action of the Court in setting aside the sale under a decree and then proceeding to sell the property without fresh proclamation is illegal. **Bishambar Das v. Udho Ram**, 25 P. R. 1907 = 21 P. W. R. 1908 = 104 P. L. R. 1907.

JOHNSTONE, J.

Civil Procedure Code—(Continued).

(912) **S. 312, 316—Sale in execution—Confirmation—Title, when it accrues—Purchaser—Mortgage debt, if extinguished by judgment.**

Although an auction-purchaser does not acquire a full title till the confirmation of the sale, yet, upon general principles, he may have equitable rights, arising out of his purchase, before the date of confirmation of the sale (a).

Scope of S. 316 of the Civ. Pro. Code examined.

Although the title to the property sold vests in the purchaser from the date of the confirmation, he does not acquire the right, title and interest, of the judgment-debtor, as they stand on that date. If he has purchased in execution of a money decree, he takes the property as it stood on the date of the attachment and is not affected by any subsequent dealings therewith on the part of the judgment-debtor. If he has purchased in execution of a decree on a mortgage, he takes the property as it stood on the date of the creation of the mortgage and persons who have subsequently become interested in different fragments of the equity of redemption cannot claim a superior title.

The mere fact that a judgment has been obtained on a mortgage does not extinguish the debt, and the mortgage continues as a lien till it is satisfied or the judgment is barred by the Statute of Limitations (b). **Bhowani Koer v. Mathura Prasad**, 7 C.L.J. 1.

BRETT and MOOKERJEE, JJ.

References.—(a) 17 B. 375, 19 A. 188, 14 A. W.N. 54, 10 B. 453, 2 C.W.N. 589, 11 C.W.N. 158, 15 L.R.A. 68, 24 L.R.A. 449, 12 L.R.A. 62, R; (b) 3 East 251=7 R.R. 449, 2 C.L.J. 202 (214) R.

(212-a) S. 312—See Nos. 208, 210 and 211, *supra*.

(213) **S. 315—Jurisdiction of Small Cause Court—Maintainability of suit by auction purchaser for refund of purchase money.**

In a suit by the auction purchaser, against the decree holder, for refund of purchase money proportionate to a share in the purchased property, of which he has been deprived on a suit by a third party, there is no contract between the plaintiff auction-purchaser and the decree holder, and therefore there is no question of rescission or specific performance of contract.

The Small Cause Court has therefore jurisdiction to entertain the suit.

Civil Procedure Code—(Continued).

2. Held also that in addition to the summary remedy provided by S. 315, Civ. Pro. Code 1882, a regular suit is maintainable under the circumstances and conditions prescribed in the section. **Gurdit Singh v. Ghanaya Lal**, 114 P.R. 1908.

LAL CHAND, J.

213 (a) S. 316, sale certificate granted under—Copy of sale-certificate registered under S. 89, Registration Act.—Sale certificate not registered document, under Art 10, Limitation Act, (1877)—See Limitation Act, No. 40—a, 142 P.R. 1908 (F.B.).

(213-b) S. 316—See No. 212, *supra*.

(214) **S. 317—Assignee from certified purchaser—suit against assignee**

This section does not bar a suit against such assignee. **Piramanayagam Pillai v. Alwar Naicker**, 18 M.L.J. 305.

WHITE, C. J. and SANKARAN NAIR, J.

Reference—21 M. 7, F.

(214-c) S. 317—See No. 308, *infra*.

(215) **S. 318—Act No. XV of 1877 (Indian Limitation Act), Sch 11, art. 178—Execution of decree—Limitation—Terminus a quo.**

Although the grant of a certificate is a necessary preliminary to an application under section 318 of the Code of Civil Procedure, such application will be barred under article 178 of the second schedule to the Indian Limitation Act 1877, if not made within three years of the date of the certificate, that is to say, the date of the confirmation of sale. **Ranjit Singh v. Baldeo Singh**, A.W.N. 1908, 162—5 A.L.J. 516=30 A. 390.

AIKMAN and GRIFFIN, JJ.

References.—3 B. 433, 17 B. 228, Diss. A.W. N. (1883) 262, R.

(216-a) S. 318—Application by decree-holder, holding sale-certificate, for delivery of possession under S. 318—Arts. 178, 179, Limitation Act See LIMITATION ACT, No. 123, 4 M.L.T. 350.

(216 a) S. 318—See No. 160, *supra*.

(217) Ss. 318 and 319—Delivery of possession of immovable property—Auction-purchaser dispossessing judgment-debtor's tenant—Dispossession not in due course of law, S. 319, C. P.C., not being followed—Suit under S. 9, Specific Relief Act, maintainable—See SPECIFIC RELIEF ACT, No 2, 12 C.W.N. 694.

(217-a) S. 319—See No. 217, *supra*.

Civil Procedure Code—(Continued).

(218) S. 320—Sale of ancestral property—Rules framed by local Government—Applications under Rules 17 (XII) and (XIII-A). See EXECUTION OF DECREE, No. 6, A.W.N. (1908), 77.

(219) S. 331—Resistance or obstruction—Decree for partition—Decree for possession—Partition Act (IV of 1893), S. 4.

Where a person is held entitled to the possession of a share in certain property after partition, and a commissioner is appointed to partition the property and put him in possession of his share, resistance to such commissioner is "resistance or obstruction," within the meaning of S. 331, C. P. Code, to a decree for possession.

It is only when the suit is for partition, that a member of the joint family may buy out the plaintiff, under S. 4 of the Partition Act. He is not entitled to do so when the suit has been decreed and the decree for possession is being executed (a). **Kali Kumar Mukerji v. Brahmananda Mukerji**, 7 C. L. J. 98.

MACLEAN, C. J. & GENT, J.

Reference.—(a) 16 M. 127, F.

(220) S. 331—Order to plaintiff to take steps under S. 331. C. P. C.—Not proper disposal of execution petition.

Where a Judge made an order in the following terms.—"Let the plaintiff take steps under S. 331, C.P.C.," it was held that such an order was not a proper disposal of the petition for execution.

Where such an order was passed behind the plaintiff's back and without notice to him, it was held that it must be set aside. **Maity Subrayadu Sukumar v. Rahim Missa Begam Saheba**, J.M.L.T. 295.

WALLIS and MUNRO, JJ.

(221) S. 332—Suit under section brought more than a year after the order passed under the section not barred under Art. 14, Limitation Act—Order under section not one referred to in Art. 14—Art. 13 not applicable to such order. See LIMITATION ACT, No 47, 10 Bom. L. R. 749.

(222) S. 335—Decree—Execution—Resistance to Possession—Obstruction by manager of a joint Hindu family—Minor co-parceners not bound by manager's acts after partition.

As a manager of a joint Hindu family, offered obstruction to defendants in taking possession of certain lands in execution of a

Civil Procedure Code—(Continued).

decree. Some time after this, the minor step-brothers of V having separated from V and the lands to which the obstruction was offered having been allotted to the minor's share, V took no further part in the miscellaneous proceeding that followed the obstruction, and on the 6th August 1898, the Court passed an order under S. 335 of the Civ. Pro. Code, in favour of defendants. The minors brought a suit on the 11th November 1903, to establish their title to the lands. Both lower Courts dismissed the suit on the ground that it was barred under Art. 11 of the Limitation Act, inasmuch as it was instituted more than a year after the order passed under S. 335 of the Civ. Pro. Code—

Held, that the order was no bar to plaintiff's suit, since V did not represent the minors when the order under S. 335 of the Civ. Pro. Code was made. **Shidappa Ryawappa v. Venkaji Krishna**, 10 Bom. L. R., 550—32 B.404.

BATCHELOR, J.

(222-i) S. 336—See No. 165 (b) *supra*.

(222-a) S. 344—Jurisdiction—Application under S. 344, not cognizable by Insolvent's Estates Court constituted under Act IV of 1872—Course of appeal—Power of revision.

Held, that an Insolvent's Estates Court constituted under the provisions of Act IV of 1872 has no jurisdiction to entertain and dispose of an application under S. 344, Civ. Pro. Code, 1882.

Held, also, that the chief Court, acting under S. 70 (a) of Act XVIII of 1884 to determine whether the Lower Appellate Court had jurisdiction to hear the appeal, *suo moto* quash the proceedings even of the first Court, when it comes to know it had no jurisdiction to hear the case. **Budha Singh v. Sada Singh**, 161 P.W.R. 1908.

SHAH DIN, J.

(223) Ss. 345, 351 and 352—Insolvent—Omission to frame schedule—Creditor's right to sue—Res judicata.

A list of debts filed under S. 345, prior to a declaration under S. 352, is not a schedule as required by S. 352. It is necessary that the Court should by order determine the persons who have proved themselves to be the insolvent's creditors and their respective debts and then frame a schedule of such persons and debts. In the absence of any such determination by Court, the declaration under S. 351, that the applicant was an insolvent, cannot be deemed

Civil Procedure Code—(Continued).

to be a decree in favour of the creditor for the amount due to him. And a suit by the creditor is therefore maintainable and is not barred as res judicata. **Harya v. Mai Chand**, 64 P. R. 1907 = 88 P.L.R. 1908.

KENSINGTON and LAL CHAND, JJ.

References:—7 M. 318, F; 76 P.R. 1899, D.

(224) S. 351—Application by debtor for declaration of insolvency and appointment of receiver—Unfair preference to creditors—Disposition of property—Bad faith—Test of unfair preference—Presumption.

Where the object of a compromise entered into by a debtor with some of the creditors was to put an end to ruinous litigation, and not to benefit them, though it may be that the transaction was in fact beneficial to them, such a compromise does not amount to an act of bad faith within the meaning of S. 351.

It is sufficient to constitute an unfair preference, if preferring the creditor was the substantial, effectual or dominant view with which the debtor made the preference, and it is not necessary that it should have been the sole view (a). If a man, on the eve of bankruptcy makes a payment to a particular creditor, the presumption immediately arises that he makes that payment, with the dominant view of giving a preference to that creditor over his other creditors. There is no need for any evidence that that view was expressed in so many words by the bankrupt; it is a presumption which would arise from the transaction (b). The same principles apply to assignments of "actionable claim" which are "dispositions of property." But where dispositions of property were made by a debtor, not with the dominant view of preferring some of his creditors but with the object that he might continue to receive financial support from such of the creditors, and were made under pressure by these creditors, such circumstances negative a preference being the dominant view with which the dispositions were made. **Angappa Chetty v. Hanjappa Row**, 2 M. L. T. 57 = 18 M. L. J. 189.

WHITE, C.J. and MILLER, J.

References:—(a) L. R. 93 Ch. 695, 10 Morrell R. (b) 1 K.B. 710, R.

(224-a) S. 351—See No. 223 and 225, *supra*.

(225) Ss. 351 and 588 (17). 589—Rejection of application for declaration of insolvency—Appeal.

Civil Procedure Code—(Continued).

An order made by a District Judge under S. 351 of the Code, rejecting an application for a declaration of insolvency, is, by virtue of Punjab Government Notification No. 940, dated 24th October, 1888, appealable to the Divisional Court, irrespective of the value of the subject-matter involved. **Raja Ram v. Prabh Dial**, 98 P. R. 1908 = 159 P.W.R. 1908.

CLARK, C.J.

(225-a) S. 352—See No. 223, *supra*.

(226) S. 362—Appeal—death of appellant—all heirs not brought upon the record—duty of the heirs—abatement.

A Mahomedan appellant having died, his sons applied to be brought upon the record in his place. The respondents applied that his daughters may also be added as parties. This application was not granted. Held that it was the duty of the sons to bring their sisters upon the record along with themselves, and they not having done so the appeal abated. **Haldar Hussain v. Abdul Ahad**, 5 A.L.J. 62 = A.W.N. (1908), 41 = 8 M.L.T. 207 = 30 A. 117.

STANLEY, C.J. and BURKITT, J.

Reference:—16 A. 611, F.

(227) Ss. 367 and 588 (18)—Dispute as to who is the legal representative of a deceased appellant—Appeal.

Held, on a construction of section 367 of the Code of Civil Procedure, that a dispute as to who is the legal representative of a deceased appellant is not confined to the case of rival claimants to represent the deceased. **Hansant Singh v. Ram Gopal Singh**, A.W.N. (1908), 139 = 5 A.H.J. 363 = 30 A. 348.

AIKMAN and GRIFFIN, JJ.

Reference:—18 M. 496, F.

(228) S. 368—Application to bring on record the representative of a deceased defendant—Death of the defendant before the presentation of the plaint—Jurisdiction of Courts to substitute his legal representatives.

Although the rule, that, on the death of the defendant, the action abated and the Court lost jurisdiction over it, was abolished in England by the Common Law Procedure Act, it is still retained in a modified form in the Civ. Pro. Code, which provides in S. 368, that unless, the plaintiff applies within the prescribed time to substitute the representatives of the deceased defendant, the suit shall abate. Now only there is then nothing in the Court to

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authorise the institution of a suit against a dead man as distinct from a suit against his legal representatives, but the death of the defendant puts an end to the suit, unless steps are taken, within a prescribed period, for bringing in the legal representative.

Consequently, when a plaint is presented by a plaintiff for the purpose of instituting a suit against a defendant, in accordance with the provisions of the Code, and it afterwards turns out that the defendant had died before the presentation of the plaint, the Court has no jurisdiction to substitute the representatives of the deceased as defendants and allow the suit to proceed against them. **Veerappa Chetty v. Pennan**, 17 M.L.J. 551 = 3 M.L.T. 12 = 31 M. 86.

WALLIS and MILLER, JJ.

References:—12 W. R. 45, F; 16 M. 319, Expl.; 18 Q.B.D. 250, R.

(229) S. 368—*Death of defendant—Dismissal of suit without giving time for joining the representatives of the deceased defendant—Appeal.*

Where, during pendency of a suit, the defendant died and the Court, without giving sufficient time to the plaintiff for bringing in the representatives of the deceased defendant, dismisses the suit, the proceedings of the Court dismissing the suit amounted to a decree and an appeal lay to the District Judge (a). It was not an order under S. 369 of the Code or any other section **Muthu Alagappa Chetty v. Sella Pillai**, 3 M. L. T. 327.

BODDAM & MILLER, JJ.

Reference:—(a) 18 M. 496, F.

(230) S. 368—*Application.*

Section 368 can only be applied where the applicant is the legal representative and not when he is merely a person alleging himself to be such representative. **Vemulapati Polamrao v. Uggumadi Subbarama Reddy**, 4 M. L.T. 237.

MILLER and PINHEY, JJ.

Reference:—8 M. 306, Cond.

(230-a) S. 368—See No. 129, *supra*.

(230-b) S. 373—See No. 192, *supra*.

(231) S. 373—*Withdrawal of suit—Liberty to file fresh suit—Permission of Courts—Costs.*

S. 373 of the Civ. Pro. C. is, 1892, contains a withdrawal not of the suit but from

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the suit, and such a withdrawal may be either with or without liberty to bring a fresh suit. If a party desires to withdraw from the suit with such liberty, then he must apply to the Court to permit him so to withdraw. If he does not desire to have that liberty, then he can withdraw of his own motion and no order of the Court is necessary.

Hence, where a plaintiff applies to the Court for permission to withdraw from the suit with liberty to bring a fresh suit, and the Court is not minded to give the liberty, the proper order to pass is that the application for permission to withdraw from the suit with liberty to bring a fresh suit for the subject-matter of the suit be dismissed with costs. It is not competent to the Court to order on such application that the suit may be withdrawn and the plaintiff to bear all costs and to pay all costs. **Mahant Bihari Dasji v. Parashottamdas**, 10 Bom. L.R. 293 = 32 B. 345.

JENKINS, C.J. and BATCHELOR, J.

(232) S. 373—*Withdrawal of suit—Withdrawal in appeal—Change in substantive law during progress of a suit—Law applicable to the suit—Dekhan Agriculturist's Relief Act (XVII of 1879), Ss. 12 and 13.*

Early in 1905, a redemption suit was filed in the Subordinate Judge's Court at Thana. The Dekhan Agriculturist's Relief Act was extended to the District in August 1905. At the trial, the Subordinate Judge took the accounts of the mortgage upon the footing of the application of Ss. 12 and 13 of the Act and gave the plaintiff the benefit of those provisions. There was an appeal: and whilst it was pending the case of 9 Bom. L.R. 917 was decided. The plaintiff then seeing that by reason of the above ruling the defendant's appeal was likely to succeed, applied to the Court for leave under S. 373 of Code of Civ. Procedure to withdraw the suit with liberty to file a fresh suit upon the same cause of action, in order that he might in the fresh suit obtain the benefit of Ss. 12 and 13 of the Act. This was allowed.

Held, (1) that the Judge in permitting the plaintiff in the stage of appeal to withdraw the suit with liberty to file a fresh suit under S. 373 of the Civ. Pro. Code, and thus get the benefit of an alteration in the substantive law, acted without jurisdiction.

Held, (2) that the suit should have been tried upon the footing that the Dekhan Agriculturist's Relief Act had no application between the parties.

Civil Procedure Code—(Continued).

Where the law is altered when a suit is pending, the law which existed when the suit was commenced must decide the rights of the parties. (a) **Prabhakar Kashinath v. Khandera Antaji Rao**, 10 Bom. L.R. 625.

BASIL SCOTT, C.J., and KNIGHT, J.

Reference :—(a) 3 B. H. C. R. 45, F.

(233) *S. 373—Act X of 1859—Civil Procedure Code (Act XIV of 1882), S. 373 applicability of.*

The provisions of S. 373, C.P. C. have no application to suits instituted under Act X of 1859.

Where a plaintiff applied to withdraw a suit for rent and the Court permitted such withdrawal but dismissed the suit and did not give distinct permission to bring a fresh suit upon the same cause of action.

Held, that a fresh suit was maintainable. **Sheikh Bolam v. Mahomad Sivendra Pada Banerjee**, 12 C. W. N. 893.

CASPERSZ and SHARFUDDIN, JJ.

(233-a) *S. 373—See Nos. 65 & 101, supra.*

(234) *Ss. 373 and 374—Limitation—Suit—Leave to withdraw—Ultra vires—Fresh suit—Limitation Act (XV of 1877), S. 14.*

An order giving leave to withdraw a suit and file a fresh suit on the same cause of action, on the ground that leave under cl. 12 of the Charter to institute it was granted by the Registrar, was held to be *ultra vires*, and the order was regarded as one only directing the plaintiff to be returned to the plaintiff (a).

S. 373 of the Code of Civil Procedure does not apply except to cases where the suit is properly pending in a Court in which the leave was granted.

A plaint was filed well within the period of limitation. But, the leave to institute it under cl. 12 of the Charter was obtained from the Registrar. Under the practice laid down by the Court, it was by leave withdrawn, and on the same cause, a fresh suit, with proper leave, was then and there instituted but on a date when, under the usual circumstances, the suit would be barred by limitation.

Held, that the leave to withdraw was not granted under S. 373 of the Code of Civil Procedure, that therefore, S. 374 of the Code could not operate as a bar to the fresh suit and that, under S. 14 of the Limitation Act (XV of 1877),

Civil Procedure Code—(Continued).

it was not barred by limitation. **Ramdeo v. Goneshnarain**, 12 C.W.N. 921, 36c=924.

FLETCHER, J.

Reference :—(a) 13 M.I.A. 160, F.

(235) *Ss. 373 and 582—Appeal—Right of one of several appellants to withdraw his appeal as to his share only. See Customs (PUNJAB)—INHERITANCE AND SUCCESSION, No. 18, 119 P.W. R. 1908.*

(2315-a) *S. 374—See No. 234, supra.*

(2316) *S. 375—Compromise decree not in accordance with relief claimed for in the plaint—Appeal—Procedure.*

The father of the plaintiffs mortgaged a portion of ancestral land to the defendant and, during the father's lifetime, the plaintiffs brought a suit against the mortgagee for a declaration that the mortgage should not affect their right of inheritance after their father's death. The parties came to terms and filed a *razinama* in Court by which it was agreed that the plaintiffs were to pay certain amount within one week and take possession of the mortgaged property. Upon this, the Court passed a decree in favour of the plaintiffs for possession of the land in accordance with the compromise. *Held*, that the compromise and the decree passed in accordance therewith were not limited, and did not relate to the subject-matter of the suit, which was merely for a declaration of the plaintiff's right to have the mortgage of the land by their father declared void and ineffectual, so far as their rights of succession were concerned, and not for the possession of the land. *Held*, that, therefore, the decree did not "relate to so much of the subject-matter of the suit as was dealt with by the compromise," and was not final within the purview of S. 375, and that an appeal, therefore, lay from that decree (a).

Held, that the proper course for the lower Court to adopt, in the circumstances, was to inform the parties that the terms of the compromise could not be embodied in a decree and if it appeared that the compromise was arrived at conditionally upon its being incorporated in the decree to proceed with the suit (b). **Bhag Singh v. Nazir**, 77 P. R. 1908=140 P.W.R. 1908.

SHAH DIN, J.

References :—(a) 13 M. 410, F; 5 C.W.N. 4=185, D; and (b) 22 M. 214, F.

Civil Procedure Code—(Continued).

(387) S. 375—Oral submission to arbitration—Award on such submission—Validity—Application to record adjustment on the basis of the award—Whether can be admitted—See ARBITRATION, No. 2, 10 Bom. L. R. 366.

(237-a) S. 375—See No. 106, *supra*.

(238) Ss. 375 and 437—Unlawful compromise by trustee—Admitting beneficiaries as parties when trustee not interested. See HINDU TEMPLE, No. 1, 12 C.W.N. 946.

(239) S. 380—Security for costs from a woman—Suit for 'money' includes a suit which results in a decree for money—Appeal lies against the order of a Judge sitting on the Original Side directing security from a woman—Letters Patent, cl. 15.

Suits which are not exclusively for money, but which will result in a decree for money on the relief sought, come within the purview of S. 380 of the Code of Civil Procedure.

An appeal lies against an order passed by a Judge sitting on the Original Side of the High Court requiring security from a woman under S. 380 of the Code of Civil Procedure.

Such an order is a judgment within the meaning of cl. 15 of the Letters Patent. **Soona Bai v. Tribhovandas N. Malvi**, 10 Bom. L. R. 337.

JENKINS, C. J. and BATCHELOR, J.

(240) S. 380, para. 2—"Such plaintiff," construction of—Infant plaintiff—Next friend—Liability of infant plaintiffs to give security for costs.

The words "such plaintiff" in the second paragraph of S. 380, Civ. Pro. Code, cannot be construed as applying to the infant plaintiff's next friend.

In the case of infant plaintiffs, unless the circumstances are exceptional, the English practice, under which they could not be required to give security for costs, should be followed (a). **Mani Bai v. Lodd Govind Dass**, 18 M L.J. 155.

WHITE, C. J. and WALLIS, J.

Reference:—(a) 23 B. 100, F.

(241) Ss. 380 and 410—Pauper plaintiff, if can be required to furnish security for defendant's costs.

The provisions of S. 380, of the Civ. Pro. Code cannot apply to the case of a person to whom permission had been granted under S. 410 of the Code to sue as a pauper, as the effect

Civil Procedure Code—(Continued).

of an order requiring such a person to furnish security for the defendant's cost would be to render nugatory the order under S. 410."

In making an order, under S. 380 of the Civ. Pro. Code, against a plaintiff who had been permitted to sue as a pauper, the Court acted in the exercise of its jurisdiction illegally and with material irregularity (p). **Musamat Hafisan v. Abdul Karim**, 12 C.W.N. 163=7 C.L.J. 312.

BRETT and HOLMWOOD, JJ.

Reference:—(a) 17 W.R. 68, *relied on*.

(241-a) S. 381—See No. 300, *supra*.

(242) Ss. 389 and 390—Evidence of *pardanashin* lady taken on commission on behalf of defendant—Plaintiff's right to refer to such evidence—Practice.

Under the provisions of S. 389, C. P. C., evidence taken on commission shall, subject to S. 390, form part of the record in the suit: and any party is entitled to refer to such evidence as a matter of record.

Thus, where the defendant examined a *pardanashin* lady on commission, and the deposition was filed in the record, but the defendants refused to tender it, it was held, that the plaintiffs were entitled to read it as a part of their case; and that there was nothing in S. 389, C.P.C. to prevent their doing so.

Held, also, that such a procedure was in accordance with *mofussil* practice. **Man Gobinda Chowdhuri v. Shashindra Chandra Chowdhuri**, 35 C. 28.

HOLMWOOD and SHARFUDDIN, JJ.

(242-a) S. 390—See No. 242, *supra*.

(243) S. 396—Final decree—suit for partition—Lands not paying revenue to Government—Partition by metes and bounds—Court, competency of, to act of itself.

Where, in a suit for partition of lands not paying revenue to government, there had been no partition by metes and bounds effected, under S. 396, Civ. Pro. Code, so that the final decree contemplated by that section had not been passed, held that the suit was to be regarded as still pending, the District Judge still being bound to pass the final decree, under S. 396, and that it was not open to the plaintiff to bring a fresh suit for partition.

The Court is competent to pass the final decree, for partition, (a) under S. 396, C.P.C., even without the application of the parties.

Civil Procedure Code—(Continued).

Togaram Appadu Patnaidu v. Togaram Venkata Ranga Rau, 18 M.L.J. 28 = 3 M.L.T. 328.

WALLIS and SANMABAN NAIR, JJ.

References :—(a) 25 M. 277, 28 M. 129 & 22 C. 425, R.

(244) S. 396—*If exhaustive—judgment, loss of—Re-writing judgment—Partition suit, lots—Drawing lots—Lots, drawing of—S. 72, Estates Partition Act.*

Where a judgment has been lost, it is open to the Judge to re-write from memory the substance of it. It cannot be expected that the Civ. Pro. Code would provide for such a contingency.

Semle : A Judge, in making allotments in a partition suit, should not draw lots in the manner provided by S. 72 of the Estates Partition Act (V of 1897), but should follow the procedure laid down in S. 396 of the Civ. Pro. Code and make the allotment of the shares after a full consideration of the rights and objections of different parties. **Narsingh Narain Singh v. Harkhu Singh**, 8 C. L. J. 521.

BRETT and MOOKERJEE, JJ.

(745) Ss. 401, 407 (d) and 592—*Leave to appeal in forma pauperis—Reference to Subordinate Court—Final disposal of the application—Appellate Court's duty.*

On an application for leave to appeal in *forma pauperis*, the High Court directed the Subordinate Judge to inquire into the pauperism or otherwise of the appellant and report. The Subordinate Judge made the inquiry and reported that the petitioner was a pauper, and also that she had rendered herself incapable of appealing as a pauper by entering into an agreement, with some persons falling within the terms of S. 407 (d). Held that the order of the Court calling upon the Subordinate Judge to report did not operate as a final disposal of the application, and that it was open to the High Court upon the receipt of the report to consider whether the case was one in which leave to appeal in *forma pauperis* ought to be granted. But the High Court dismissed the application on the ground that the petitioner had entered into an agreement falling within S. 407 (d).

In deciding whether leave is to be given to a person to appeal in *forma pauperis*, it is the duty of the Court to have regard to the rules

Civil Procedure Code—(Continued).

contained in Chap. XXVI, the right of appeal according to the construction of S. 592 of the Code, being subject to the rules contained in that chapter (a) **Hamfa Bai v. Meanjee Salt**, 17 M.L.J. 447 = 3 M.L.T. 11 = 30 M. 547.

WHITE, C.J. and MILLER, J.

Reference :—(a) 26 M. 369, R.

(246) Ss. 403 and 592—*Application for leave to appeal as pauper, verification of—*

An application for leave to appeal as a pauper under Section 592 of the Code of Civil Procedure contained no schedule of any movable and immovable property belonging to the applicant with the estimated value thereof, and was not verified in the manner prescribed by law for the verification of plaints. Held that the Court had no alternative but to reject the application. **Muhammad Salamat-ul-lah v. Ram Jiwan**, 11 O. C. 19.

EVANS, A. J. C.

(246-a) S. 407 (d)—See No. 245, *supra*.

(247) Ss. 407 & 409—*Suit in forma pauperis—Evidence taken for deciding limitation—Jurisdiction.*

A Court has jurisdiction to decide the question of limitation under Ss. 407 & 409 of the Code (a). The Court before which an application is made to sue in *forma pauperis* has power not only to enquire into the question of pauperism, but also as to whether the applicant has a *prima facie* good and subsisting cause of action; and for the purpose it may take evidence under S. 409, Civ. Pro. Code. In case of doubt the Court whose permission is asked to sue in *forma pauperis* should grant the application if the applicant has made out that he is a pauper; but even in such a case, if the Court proceed to shift the matter, it cannot be said to exceed its jurisdiction, but at the most would be acting irregularly. **E. N. Venkoba Rao v. Thunla Nataraja Chetty**, 4 M. L. T. 302.

ABDUR RAHIM, J.

References :—(a) 20 A. 299 and 19 M. 197, F.

(248) Ss. 407 and 409—*Application for leave to sue as pauper, when good prima facie title to property in suit not established—See PAUPER SUIT, No. 1, 11 O.C. 67.*

(248-a) S. 409—See Nos. 247 and 248, *supra*.

(248-b) S. 410—See No. 241, *supra*.

(249) S. 412—*Withdrawal of suit on compromise—Payment of Court fees—Financial*

Civil Procedure Code—(Continued).**Commissioner's authority over litigation concerning Government.**

Where a person is permitted to sue as a pauper, but the suit is withdrawn under a compromise, and he gives up his claim to the subject of the suit, the suit must be deemed to have failed within the meaning of S. 412 of the Code. It did not succeed in attaining its object, and it is immaterial whether the plaintiff voluntarily gave it up or lost it by the decision of the Court (a). He is liable to pay the Court-fees payable by him if he was not allowed to sue as pauper.

The Financial Commissioner, Punjab, has, under Government rules, full authority over litigation in which the Government is concerned. And the right of the Government Advocate to represent the Secretary of State cannot be questioned. **Secretary of State for India v. Surju Das**, 104 P. R. 1908 = 160 P. W. R. 1908.

CHATTERJI, J.

Reference.—(a) 31 B. 10, F.

(250) S. 424—Suit against official not as such trespass—Suit for injunction—Notice if necessary—See COURT OF WARDS, No. 1, 12 C.W.N. 1065.

(250-a) S. 424—See No. 57, *supra*.

(251) S. 437—Suit against mutwallis—Suit for rent—Parties—Minor—Representation.

When a suit for rent was brought against two persons, in the capacity of mutwallis, but one of them who was a minor was not properly served, and no guardian was appointed on his behalf.

Held, that mutwallis are trustees, and that the presence of all of them in the suit was essential, and that it was properly dismissed for defect of parties. **Syed Abdul Rab Chowdhury v. H. C. Eggar**, 12 C.W.N. 160 = 35 C. 182.

MACLEAN, C.J. and GEIDT, J.

(251-a) S. 437—See No. 238, *supra*.

(252) S. 440—Minor—Suit by next friend—Notice to certificated guardian—No formal order granting leave to next friend to sue—Presumption.

A, as next friend of B, a minor, instituted a suit to have a sale deed executed by C, the certificated guardian of B, set aside. Notice was issued to C, under S. 440, Civil Procedure Code, but he showed no cause. No formal order granting leave to A to institute the suit was recorded, but the Court proceeded to frame

Civil Procedure Code—(Continued).

issues, and examine witnesses. Held, that it must be presumed that the Court did grant leave to the person who presented the plaint, after being satisfied that it was for the welfare of the minor that that person should be permitted to institute the suit on the minor's behalf, and the Court below was wrong in dismissing the suit on the ground that leave to institute the suit had not been formally granted and recorded. **Sridhar Rao v. Ram Lal**, 5 A. L.J. 633—A.W.N. (1908), 251 = 4 M.L.T. 448.

STANLEY, C.J., and BANERJI, J.

(253) Ss. 440 and 443—Representation of minor plaintiff—Leave of Court—Certificated guardian not appointed—Compromise—Court to decide if for benefit of minors.

Where the mother of a minor is allowed by Court to act for her son, it is a fair inference that she was appointed guardian by the Court, even though there is no formal order in the record so appointing her.

Where the Court acts in contravention of S. 443, Civ. Pro. Code, and, overlooking the claims of the certificated guardian, appoints somebody else guardian of the minor, it is a more irregularity. (a)

Even though there be no order which states in so many terms, that the Court has considered the compromise and held it to be for the benefit of the minors, it must be assumed, in the absence of evidence to the contrary, that the Court did its duty in the matter. **Madnapore Zemindari Co. v. Gobinda Mahto**, 8 C.L.J. 31.

WOODROFFE and COXE, JJ.

Reference.—(a) 29 A. 290, approved and followed.

(254) Ss. 440 & 578—Minor—Suit instituted without next friend, effect of—Irregularity—See GUARDIAN and MINOR, No. 4, 11 O.C. 159.

(255) S. 443—Court should not appoint as guardian *ad litem* a person whose act is called in question in the suit, even though it is a case to which S. 443, C.P.C., applies. See GUARDIAN AND MINOR, No. 5, 11 O.C. 319.

(255-a) S. 443—See No. 253, *supra*.

(256) S. 447—Next friend ceasing to be guardian under Guardian and Wards Act—See DECREE, No. 2, 5 A.L.J. 35.

(257) S. 457—Guardian of minor plaintiff respondent—Married woman—Custom—Alienation by father—Necessity for sale

Civil Procedure Code—(Continued).

established—Consideration for sale higher than the amount necessary to raise.

A minor plaintiff filed a suit, through his mother as his next friend, against his father, and the case was decreed. The defendant appealed making the mother as guardian of the minor plaintiff-respondent. A question was raised whether the mother could continue to act as guardian, notwithstanding the provisions of S. 457 of the Civ. Pro. Code. The Chief Court did not consider it necessary to take the matter up of its own motion, when the appellant elected to proceed with the appeal as brought.

Where necessity for sale of ancestral property by a father is established, no declaration should be given in favour of sons that the sale would not affect their interests after the father's death, for the mere fact that the property was sold at a higher price by a small sum than it was necessary for the father to raise. **Wadhwa Mal v. Wadhwa**, 144 P.L.R. 1906 = 8 P.R. 1908 = 83 P.W.R. 1908.

KENSINGTON & CHITTY, JJ.

(258) **S. 461—Mitakshara joint family—suit by managing member for family debt—Representing minor co partner as next friend—withdrawal of decretal money from Court—Next friend if must furnish security.**

A suit to recover a joint family debt was instituted by the managing member of a joint Mitakshara family appearing for himself and as next friend of the other member of the joint family who was a minor. A decree having been obtained and the decretal amount deposited in Court by the defendant, the plaintiffs applied for the withdrawal of the amount.

Held—That S. 461 of the Civ. Pro. Code did not apply to the case, and the managing member could not be required to take the Court's leave and to give security under that section before being allowed to withdraw the money. **Harihar Pershad Singh v. Mathura Lal**, 12 C. W. N. 598 = 35 C. 561 = 8 C. L. J. 256.

MITRA and CASPERSZ, JJ.

(259) **S. 462—Court's duty in granting leave—Compromise—Certificated guardian if to take permission of Judge Guardian and Wards Act (VIII of 1890), S. 29—Review—Suit to set aside decree, if maintainable—Fraud—Valuation—Jurisdiction.**

A compromise of a suit is not one of the acts contemplated in S. 29 of the Guardian and Wards Act; hence a certificated guardian can

Civil Procedure Code—(Continued).

compromise a suit without obtaining the sanction of the District Judge. The statutory provision for safe-guarding the interests of minors in suits, is contained in S. 462 of the Code of Civil Procedure.

The Court in sanctioning a compromise on behalf of an infant under S. 462 of the Code of Civil Procedure, should record the fact that the application was made to it by the next friend or guardian, that the terms of the compromise were considered by it, and should in terms state that the question whether the compromise was for the benefit of the infant was considered. From the mere fact that the Court passed the decree in accordance with the compromise, it cannot be inferred that any of those steps preliminary and necessary to the making of the decree had been taken by the Court (a).

Where a decree is passed on adjudication, no separate suit lies to set aside the decree except on the ground of fraud, but where it is passed simply upon a compromise, a suit lies upon grounds other than that of fraud (b).

Where the minors were defendants represented by their mother and guardian, in the original suit as also in the review petition, and the application for review was discharged with the express direction that the applicant's proper remedy was by way of suit and not by way of review, a suit by the minors through a new next friend, their mother and former guardian *ad litem* being impleaded as a defendant, lies to set aside the decree on grounds other than that of fraud (c).

Where the plaintiffs valued their claim in the Munsiff's Court at Rs. 500, and issue was taken on the point, (which if decided in favour of the defendant would have ousted the Munsiff's jurisdiction), but no evidence was adduced, there was no waiver of jurisdiction and the High Court can interfere on second appeal (d). **Biku Halwai v. Mohesh Halwai**, 8 C.L.J. 266.

MOOKERJEE and HOLMWOOD, JJ.

References.—(a) 16 W.R. 232; 17 A. 581; 26 B. 109; 7 C.W.N. 90; 29 M. 104, F. (b) 84 C. 83, F. (c) 2 C.L.J. 508, D. (d) 24 M. 43, D.

(260) **S. 462—Leave of Court, must be express—Presumption—Compromise decree when to be set aside.** See PRIMOGENITURE, No. 1, 8 C.L.J. 274.

(260-a) **S. 462—See No. 79, supra.**

(261) **Ss. 462 & 525—Mahomedan mother, right as guardian of minor—Power to make**

Civil Procedure Code—(Continued).

- contract or refer to arbitration on minor's behalf—guardian ad litem—Right to give relief to illiterate women imposed upon—Pleader and client.

The mother of a Mahomedan minor, not being the legal guardian of his estate, has no power to make a binding contract on behalf of the minor; nor can she pass a valid reference to arbitration on behalf of the minor.

But, if she be duly appointed as the Guardian *ad litem* of the minor, and makes an application under S. 525 to have an award filed in Court, and a decree is passed in terms of the award, the minor is bound by it, unless good cause be shown to set aside the decree.

Such a decree is not a nullity on the ground that previous sanction of the Court was not obtained under S. 462, C.P.C.

S. 462, C.P.C., applies only to an agreement or compromise entered into by a next friend or guardian for a suit. It can have no application to an agreement to refer to arbitration where no suit is pending. If an award is filed under S. 525, and a guardian *ad litem* is duly appointed, but shows no cause why the award should not be filed, and allows judgment to be given in terms of the award, then also S. 462 has no application, for there is no agreement or compromise. But where a guardian *ad litem* is actually a party to an application to have the award filed, that is a party to an agreement that no objections shall be filed on either side, then sanction of the Court under S. 462 becomes necessary. And if such sanction is not obtained, the Court has power to set aside the decree so far as the minor is concerned.

Though the Court will always be ready to give relief to illiterate women who have been imposed upon, yet it must observe the ordinary recognized rules of law and procedure in granting such relief.

In dealing with questions arising between pleader and client, the client must be identified with his pleader, and suffer from the consequences of his dishonesty or want of skill. **Mir Main Ghulam Hyderkhan v. Mussamat Hayat Khatun**, 1 Sind L.R. 160.

LUCAS and CROUCH, J. CS.

(261-a) S. 470—See No. 177, *supra*.

(262) S. 488—Attachment on insufficient grounds—Damages—Proof of malice—Memo of objections withdrawn—jurisdiction as to costs.

Civil Procedure Code—(Continued).

An order under S. 488, Civ. Pro. Code, where the application has been made on insufficient grounds, must necessarily cause damage to the credit and reputation of the party against whom the order is made, and general and special damages are recoverable.

Quere:—Whether it is necessary to prove that the defendant acted maliciously in the above case.

The practice as to the form of an order when a memorandum of objections has not been stamped and has not been moved, does not seem to be uniform, but orders dismissing the memorandum in such circumstances have been made and there is jurisdiction to make the order. If there is jurisdiction for making an order dismissing an application, there is of course jurisdiction to make an order dismissing it with costs. **Palani Kumarasami Pillai v. Udayar Nadan** = 4 M. L. T. 303 = 18 M. L. J. 490.

WHITE, C. J., and ABDUR RAHIM, J.

Reference:—11 Q.B.D. 674, *Appl.*

(262-a) S. 490—See No. 115, *supra*.

(263) S. 491—Arrest before judgment—damages for wrongful arrest—Damages for arrest cannot be tried by counter claim—Practice. See HIGH COURT RULES (BOMBAY), No. 4, 10 Bom. L. R. 1002.

(264) Ss. 492, 493—Court's power to issue injunction where there is no allegation that the property the subject of the suit is likely to be wasted or removed by defendants.

Where there is no allegation that the property which is the subject of the suit is likely to be wasted or removed by the defendants, the Court has no jurisdiction to issue an injunction under S. 492 of the Code. **S. Subramania Nayluar v. S. Vengu Iyer**, 4 M. L. T. 91 = 18 M. L. J. 302.

MILLER, J.

(264-a) S. 493—Injunction—Mode of enforcing it—Breach of terms of an injunction—Whether it amounts to an offence—Whether the Court can punish such offence of its motion—Application for sanction to prosecute for the offence of—Whether such application gives authority to the Court to punish for disobedience of injunction—Crim. Pro. Code (Act V of 1898), S. 195—Penal Code (Act XLV of 1860), S. 188.

The object of paragraph 8 of S. 493, Civ. Pro. Code, 1882, is to provide a mode of enfor-

Civil Procedure Code—(Continued).

ing an injunction. It is not to be assumed that the use of the word "disobedience" in the paragraph entitled the Court to treat a breach of the terms of an injunction as an offence and to punish such offence of its own motion. The Court can act under this section only when set in motion by the party, who deems himself aggrieved. (g).

In a suit to cancel an instrument of sale of paddy, the Court issued an injunction restraining the defendant from selling the paddy specified in the document.

The injunction was served on the defendant and afterwards the suit was decided in favour of the plaintiff, who afterwards presented a petition complaining that, while the injunction remained in force, the defendants had sold some of the paddy, and asked for sanction under S. 195, Crim. Pro. Code, to prosecute defendant under S. 188, Penal Code. The Judge caused a preliminary inquiry to be made and then called on defendant to show cause why he should not be committed under S. 493, C. P. C., and he committed the defendant (present appellant) to the Criminal jail for four months, the order being passed explicitly as a punishment for disobeying the injunction.

Held that the application for sanction to prosecute the defendant did not give the Court authority to act under Cl. (3), S. 493, Civ. Pro. Code, 1882. **Maung Tha U v. Lutchman Chetty**, 14 Bur. L. R. 276.

* IRWIN, J.

Reference:—(a) 26 M. 494, F.

(264 b) S. 493—See No. 264, *supra*.

(265) S. 494—order of injunction without notice to opposite party, legality of—See INJUNCTION, No. 2, 11 O.C.151.

(265-a). *Ss. 499, (b) 591 and 632—Interlocutory orders, revision of—Act conferring jurisdiction—Powers to do acts necessary to its execution—Order to open a door-way to allow Receiver for making an inventory.*

The High Court refuses to interfere in revision with interlocutory orders, because, under S. 591, Civ. Pro. Code, they can be made ground of objection, in the appeal from the decree. But where the Court of appeal cannot grant any relief for any damage that might be caused by such order, it is not an interlocutory, but a final order (a).

Civil Procedure Code—(Continued).

Where an Act confers a jurisdiction, it impliedly grants also the power of doing all such acts or employing such means as are essentially necessary to its execution. The power is, however, limited to such acts as are essentially necessary to give effect to the order (b).

An order by a Sub-Judge to open up a particular passage by the defendant, to allow a receiver to enter upon the premises for the purpose of making an inventory, is without jurisdiction, if the defendant provides another means of access through his premises. **Dero, H. H. Mir Hassanalikhan v. H. H. Mir Abdul Hussain Khan**, 2 Sind L. R. 22.

PRATT, J.C. and HAYWARD, A.J.C.

References:—(a) 18 B. 35 and 1 Sind L. R. 120, R., (b) 14 B. 157, R.

(266) S. 503—Receiver—Appointment of receiver to realize amounts of decrees under attachment.

Where a decree holder had in execution of his decree attached two decrees held by the judgment-debtor against third parties, it was held that section 503 of the Code of Civil Procedure gave power to the Court to appoint a receiver to realize the amounts of the attached decrees where it appeared that by so doing the interests of both decree-holder and judgment-debtor would be better protected. **Partap Singh v. The Delhi and London Bank, LD.**, A.W.N. (1903), 161=5 A. L. J. 583 = 30 A. 933.

AIKMAN and KARAMAT HUSAIN, JJ.

(267) S. 503—Appointment of receiver by High Court pending appeal—Power of subordinate Court to give directions as supplementary to those given by the High Court.

Where a person was appointed receiver by the High Court, pending an appeal, no other Court has power to make an order or give any directions as supplementary to those give by the High Court, or without authority given by that Court. **Janaki Ammal v. Narayanaswami Iyer**, 4 M. L. T. 268.

MILLER and PINHEY, JJ.

Reference:—27 M. 602, R.

(268) S. 503—Appointment of a Receiver—not to be made without special reasons—*Bona fide* possessor with legal title. See RECEIVER, No. 3, U. B. R. (1908), 2nd Quarter, Civil Procedure, p. 17.

(269) S. 503—Principles relating to the appointment of Receiver. See RECEIVER, No. 4, 107 P.R. 1908.

Civil Procedure Code—(Continued).

(269-a) S. 508—See No. 54, *supra*.

(270) Ss. 503, 505, 588—*Receiver, appointment of—Recommendation by subordinate Judge to District Judge—Refusal by the latter to appoint—Appeal.*

A subordinate Judge recommended to the District Judge the appointment of a receiver under S. 505 of the Code. The latter refused to make any appointment. On appeal to the High Court:—*Held*, that no appeal lay against the order, which was passed under S. 505 and not under S. 503 of the Code, and respecting which no appeal was provided for by S. 588 of the Code (a). **Bai Mani v. Khimchand Gokaldas**, 10 Bom. L. R. 1037.

SCOTT, C. J., and BATCHELOR, J.

Reference:—(a) 7 C. 719, F.

(271) Ss. 503 and 588, cl. (24)—*Receiver's accounts, orders in passing—Appeal.*

The directions which a Court gives in passing a Receiver's accounts are not appealable under cl. (24) of S. 588 of the Civ. Pro. Code. **Rapi Keshabati Kumari v. W. O. MacGregor**, 12 C.W.N. 648=35 C. 568.

RAMPANI and SHARFUDDIN, JJ.

(271-a) S. 505—See No. 270, *supra*.

(271-b) S. 506—See No. 79, *supra*.

(272) Ss. 506 and 510—*Arbitration.*

Held that when parties apply orally to the Judge to refer the suit to arbitration, and the Judge reduces their application to writing, and then makes a reference to arbitration, it is not open to him, having regard to the provisions of S. 510 of the Civ. Pro. Code, to supersede that reference, the arbitrator having declined to act.

Held, further, that the second paragraph of S. 506 is directory only. **Abdul Hamid v. Riyaz-ud-Din**, 4 A.L.J. 691=A.W.N. (1907), 273=30 A. 32.

AIKMAN, J.

References:—6 M. I. A. 184, D, 27 C. 61 and 23 B. 699, R.

(273) S. 508—*Arbitration—Order of reference not fixing a period within which the award is to be made—Appeal.*

Where an order of reference to arbitration made by a Court omits to fix a date for the delivery of the award, such omission is not a mere irregularity, but is a defect fatal to the order and to all subsequent proceedings founded thereon (a). **Lachman Das v. Abparkash**, A. W.N. (1906), 59=5 A.L.J. 144=30 A. 169.

STANLEY, C. J. and HUNK, J.

Civil Procedure Code—(Continued).

References:—(a) 8 A. 548, F; 18 I. A. 55=13 A. 300, I.

(274) S. 508 et seq.—*Arbitration—Award—Award set aside—Court not empowered to make a second reference on the same submission.*

The parties to a suit pending in the Court of a Munsif referred the matters in dispute between them to arbitration. An award was made and delivered; but it was afterwards discovered that one of the plaintiffs had died before the termination of the arbitration proceedings, and the Munsif accordingly set aside the award. *Held* that the Munsif had no power to make a second order on the same agreement of the parties again referring to arbitration the matters in dispute between them. **Pachkauri Ram v. Nand Rai**, A.W.N. (1908), 228=5 A.L.J. 658.

KIRAMAT HUSAIN and GRIFFIN, JJ.

References:—21 A. 314, D; 2 A. 181, 27 M. 112, R.

(274-a) S. 508—See No. 270, *supra*.

(275) Ss. 509, 522—*Difference of opinion, no provision for—Judgment not in accordance with award—Appeal.*

When the arbitrators have given an unanimous award, the award is not a nullity, because no provision has been made in the order of reference for a contingency that has never arisen, viz., that the arbitrators might have differed. (a)

S. 522 of the Code does not allow an appeal on the ground that the judgment is in excess of the award, but only on the ground that the decree is so. **Bepin Behary Sen v. Krishna Behary Sen**, 8 C.L.J. 475.

COXE & DOSS, J.J.

References:—(a) 17 W. R. 30 F, 4 W. R. 4; 14 W. R. 150; and 8 A. 64, D.

(276) S. 510—*Arbitration—Refusal of umpire to act—Power of Court to appoint a fresh umpire.*

Held that section 510 of the Code of Civil Procedure does not apply only to cases where a person has signified his assent to take upon himself the duties of an arbitrator or umpire and, after so signifying his assent, dies, or refuses or becomes incapable to act. **Fayaz-ud-din v. Amlin-ud-din**, A. W. N. (1906), 159.

GRIFFIN, J.

Reference:—18 C. 324, Diss.

Civil Procedure Code—(Continued).

(276-a) S. 510—See No. 272, *supra*.

(277) S. 520—*Award by arbitrators in excess of their authority*—"Such other and further relief," meaning of.

Plaintiffs sued for a declaration that the alienage of a Hindu widow got no more than the life-interest of the widow, and that the alienation was invalid and inoperative except for her life-time. They also added a prayer for "such other relief as the Court deemed fit."

The matter "in dispute in the case" was referred to arbitration. The arbitration passed the following award, "we direct that defendant No. 1 do pay Rs. 1,500 to the plaintiffs, and that the sale for which the suit is brought be declared valid, binding and absolute." Held that the arbitrators had exceeded their jurisdiction, and that the words "such other and further relief," though wide, cannot be held to include a request to the Court to create an obligation which is not alleged to exist. **Tikam das v. Phatmal**, 1 Sind. L.R. (Civil), 209.

CROUCH, J.

References:—31 C. 433 (440), 24 A. 229, 10 A. and E. (1841) 199, R.

(278) Ss. 520 and 521—*Enforcement of award of compensation in a seduction case—Courts have only to look to the provisions of S. 520 and S. 521, Civ. Pro. Code.*

There is no authority for the view that arbitrators can take cognizance only of claims in respect of which the Regular Courts will give relief. In deciding whether an award should be enforced or not, the Courts have only to look to the provisions of Ss. 520, 521, Civ. Pro. Code and determine "whether any of the grounds mentioned or referred to in those sections is shown against the award. The fact that the applicant could not have sued the respondent for damages cannot be regarded as "an objection to the legality of the award." The Buddhist Dhammathats provide for the payment of compensation for seduction, and though such cases are not now decided according to Buddhist Law, compensation for seduction is still frequently paid by private arrangement between the parties or their families, and there is nothing immoral in such an arrangement. According to English Law, the consideration of past cohabitation and previous seduction does not make a bond void. Such consideration is not held good so as to support a promise not under seal, but it is not illegal. **Mi Hla Waing v. Nga**

Civil Procedure Code—(Continued).

Kan, U.B.R. (1908), 2nd Quarter, Civil Procedure, p. 19.

TWOMEY, J.

(279) Ss. 520 and 522—*Award remitted by Court for revision—Decree in terms of revised award—Appealability of remittal—Construction of S. 522, C. P. C.*

When an award, remitted by Court under S. 520, C. P. C., is revised by the arbitrators, and a decree has been passed by the Court in terms of the revised award, the terms of S. 522, C. P. C., preclude an appeal on the ground that the order of remittal is wrong and that the award as originally submitted should have been accepted and acted upon (a).

When the decree is in accordance with the award, the policy of the law is to refuse appeal on the ground that an order under S. 520, C. P. C., has been improperly made or improperly refused.

The provisions of S. 522, C. P. C., should be strictly construed (b). **Subbiah Iyer v. Subramania Aiyer**, 4 M.L.T. 328 = 18 M. L. J. 485.

BENSON and WALLIS, JJ.

References:—(a) 22 M. 203, D. (b) 29 C. 167, R.

(280) S. 521—*Arbitrator receiving evidence from one party in the absence of the other—Judicial misconduct—Setting aside award—Appeal—Appellate Court's power to go behind first Court's order setting aside award.*

A Court is perfectly justified in setting aside the award of the arbitrators on the ground that the latter had been guilty of judicial misconduct in having taken the evidence of one party in the absence of the other which was wholly unavoidable, and in having omitted to give the latter sufficient opportunity to produce his own evidence.

Quere:—Whether an Appellate Court had power to go behind the order of the first Court, setting aside such an award. **Soba Ram v. Ram Das**, 66 P. R. 1907 = 159 P. L. R. 1908 = 148 P. W. R. 1907.

ROBERTSON and SHAH DIN, JJ.

References:—2 A. 181 3 A. 636 28 A. 408, 22 M 202, 8 C W. N. 390, F.

(280-a)—S. 521—See No. 278, *supra*.

(281) Ss. 521, 521, 32—*Arbitration—Award—Award set aside upon ground not contemplated by S. 521—Appeal.*

Civil Procedure Code—(Continued).

In a suit pending in the Court of a Munsiff, the matter in dispute between the original parties was referred to arbitration. To this arbitration a third person who had been brought upon the record as a defendant under section 32 of the Code of Civil Procedure was not a party. An award was made dismissing the plaintiff's claim, but on an objection being preferred to the effect that all the parties to the suit were not parties to the arbitration, the Munsiff set aside the award, proceeded with the suit, and on the merits granted the plaintiff a decree. An appeal against this decree by the defendant was dismissed. Both Courts found that the defendant who had been added under section 32 had no interest in the subject matter of the suit. The plaintiff appealed, on the ground, *inter alia* that "the Courts below had no jurisdiction to set aside the award so far as the parties to this appeal are concerned."

Held that an appeal lay, and was not barred (a). **Ramiawan v. Nawal Singh**, A. W.N. (1908), 242=5 A. L. J. 644=4 M.L.T. 400.

KNOX and GRIFFIN, JJ.

References:—(a) 18 A. 19 and 22 A. 366, D. 22 M. 202 and 18 M.L.J. 228, R.

(281-a) S. 522—See No. 275, 279, *supra*.

(282) Ss. 522 and 526—*Private arbitration—Award made a rule of Court—Appeal*.

When an award made in a private arbitration has been made a rule of Court and a decree passed thereon no appeal will lie except so far as the decree is in excess of or not in accordance with the award. In this respect there is no difference between a decree based upon a private award and a decree based upon an award made through the intervention of the Court (a). **Bahadur Singh v. Negi Puran Singh**, A.W.N. 1908, 54=5 A.L.J. 160=30 A. 151.

BANERJI and RICHARDS, JJ.

Reference.—(a) 27 A. 526, D.

(283) S. 523—*Order refusing to file agreement to refer to arbitration—Appeal*.

Held, that an appeal lies against an order refusing to file an agreement to refer to arbitration. **Khalka Baksh Singh v. Suambar Singh**, 11 O. C. 116.

EVANS and GRIFFIN, A. J. CS.

References:—5 A. 383, 3 A. 205, 29 A. 167 and 9 C. 205, R.

Civil Procedure Code—(Continued).

(283-a) S. 523—See No. 4, *supra*.

(284) Ss. 523 and 526, difference between, as regards appeal—Revision—See **APPEAL, GENERAL**, No 2, 58 P.W.R. 1907 (F.B.)=1 P.R. 1908.

(285) S. 525—*Appeal—Award, application to file, order refusing—Civ. Pro. Code (XIV. of 1882), S. 525*.

An appeal lies against an order refusing to grant an application to file an award under S. 525 of the Civ. Pro. Code, **Sheo Sahaj Mahton v. Kirtarth Bhagat**, 7 C.L.J. 486.

BRETT and CHITTY, JJ.

References:—29 C. 167, R; 3 C.L.J. 450=33 C. 757, F, 6 A. 186, 26 A. 205, not F.

(285-a) S. 525—See Nos. 66 and 261, *supra*.

(286) Ss. 525 and 526—*Destruction of award after presentation in Court—Whether ground for refusing to file award—Whether parties can be referred to regular suit*.

An application was made to file an award, under S. 525, C.P.C. The Court declined to file it on the ground that the records of the case containing the award were destroyed by fire. *Held*, that, since the award had already become part of the record of the Court, the Court could not refuse to file it under S. 526, C. P. C., and refer the parties to a regular suit (a).

The mere fact of the destruction of the records of the case does not necessarily show that the investigation will be either long or difficult (b). **Lekhraj Khubchand v. Khubchand Manghir msi**, 1 Sind. L. R. 167.

HAYWARD and CROUCH, JJ.

References:—(a) 12 M. 331, D; (b) 7 Bom. L. R. 644, R.

(287) S. 526—*Private award—Order refusing to file such award—Appealability*.

An order under S. 526 of the Code, refusing to file an award of arbitrators made out of Court, is appealable as a decree (a). **Mul Raj v. Ladda Mal**, 100 P.R. 1907=17 P.L.R. 1908.

ROBERTSON and KENSINGTON, JJ.

References.—(a) 26 A. 205, Diss. 27 M. 255; 29 M. 303; 25 C. 757; 33 C. 757; 84 P.R. 1907 (F.B.), F; 25 P.R. 1907 (P.C.) at p. 29; P.R. 1907, F.R. R.

(288) S. 526—*Order refusing to file award—appeal*.

An appeal lies against an order refusing to file an award under S. 526 of the Code, inasmuch as it is a decree. **Maung Ngo v. Ranganatham Chetty**, 4 L.B.R. 130.

FOX, C.J. and MOORE, J.

Civil Procedure Code—(Continued).

References:—25 C. 757; 33 C. 757, 27 M. 255, F; 38 A. 21, *Duss.*; 29 C. 167 and 18 C. 414, R.

(288-a) S. 526.—See No. 282, 284, and 286, *supra*.

(289) S. 539—*Public charitable trust—Breach—suit—Jurisdiction—Court in which suit should be brought.*

Under S. 539 of the Civ. Pro. Code, one of two conditions must exist in order to bring a suit within its purview. Either there must be an alleged breach of any express or constructive trust created for public, charitable or religious purposes, or there must be some direction of the Court deemed necessary for the administration of any such trust. If in any suit one of these two conditions exist, it must be filed in the Court (mentioned in the section) either by the Advocate General or by two or more persons interested in the trust, with the sanction of the Advocate General previously obtained.

It is not necessary to such a suit that a relief should be claimed of the description of the clauses (a), (b), (c), (d), and (e) in that section. These reliefs are not exhaustive and any other relief may be claimed in such a suit. **Amritram Harinarayan v. Ramji Vallabh**, 10 Bom. L.R. 87 = 3 M.L.T. 172.

CHANDAVARKAR and HEATON, JJ.

(290) S. 539—*Whether directory or mandatory—Sanction of Advocate General—Pre-existing right of suit whether taken away by S. 539—Question relating to jurisdiction, whether can be waived.*

Statutes imposing restrictions upon the subject's right of suit must be construed strictly. Hence a pre-existing right of suit cannot be held to be taken away by the words of S. 539, C.P.C., those words being merely permissive or directory, and not mandatory.

Under Hindu Law, a member of the Hindu community, interested in a public "tikana" or place of worship, can maintain a suit in respect of such "tikana." And no certificate of the Advocate-General is necessary under S. 539, C. P. C.

Questions relating to jurisdiction (as, the question that the certificate of the Advocate-General is necessary under S. 539, C. P. C., for the institution of the suit) may be raised in second appeal, though waived in the lower Courts.

Civil Procedure Code—(Continued).

There cannot be a waiver of jurisdiction. **Musamat Radhibai, wife of Kishendas v. Mr. Kundamal Sd Diawn Asumal**, 1 Sind. L.R. 155.

PRATT and HAYWARD, JJ.

(291) S. 539—*Suit relating to charity—Suit brought by the Advocate-General at the instance of relators—Dismissal of suit—Right of appeal—Relators cannot appeal in their own right.*

Where a suit filed, under S. 539 of the Code, by the Advocate-General, at the instance of relators, is dismissed, and the Advocate-General does not think fit to appeal, it is not competent to the relators to file an appeal on their own account, against the dismissal. **Jan Mahomed Abdul v. Syed Nurudin**, 9 Bom. L.R. 996 = 32 B. 155.

CHANDAVARKAR and HEATON, JJ.

(292) S. 539—*Suit by some of the subscribers of a religious and charitable society for removal of office-bearers appointed under rules of society and not by subscribers, and for accounts—Suit brought without sanction or consent of Advocate-General.*

In a suit brought, without the sanction or consent of the Advocate-General, by some of the subscribers of a religious and charitable society, on behalf of themselves and all other persons interested in the subject-matter of the suit, for the removal of certain office-bearers from their respective offices, for accounts and for payment into Court of the money which may be found due from them to the society, it having been found that the officers were appointed under the rules of the society and not by the subscribers, that the subscribers were not entitled, as of right, to make any claims upon the funds of the society, and that they were not the beneficiaries of the trust, *held, per White, C.J.*, that they had no right to maintain the suit, even if they had obtained the sanction under S. 539, C.P.C. (a).

Held per Abdur Rahim, J., that the presens suit, having been brought without the sanction or the consent of the Advocate-General being first obtained under S. 539, C.P.C., was not maintainable. (b), **H. A. D'Cruz v. J. L. D'Silva**, 4 M.L.T. 245.

WHITE, C.J., and ABDUR RAHIM, J.

References:—(a) 8 B. 432, not F; (b) 24 M. 186, 33 C. 789, *Expl.*

Civil Procedure Code—(Continued).

(293) S. 539—Court's power to appoint new trustee, manager or superintendent of religious institution—Proceedings to be resorted to for such action—See Act XX of 1863 (RELIGIOUS ENDOWMENTS), No. 2, 5 A. L. J. 191.

(294) S. 539—Removal of manager of religious institution—Necessity for sanction—See Act XX of 1863 (RELIGIOUS ENDOWMENTS), No. 3, 7 P. R. 1908.

(291-a) S. 533—See Nos 51, 54 & 55, *supra*.

(295) S. 540—Order of Court refusing to make conditional decree for foreclosure absolute—Whether decrees appealable. See MORTGAGE (FORECLOSURE), No. 1, 4 N. L. R. 51

(293-a) S. 540—See No. 5, *supra*.

(296) S. 544—Land given up by 1st lessee on receipt of compensation money in favour of 2nd lessee—High Court declaring 1st lessee valid—2nd lessee entitled to restitution—set off in restitution—equitable relief—adjustment of accounts—"who seeks equity must do equity."

In 1880, Z leased certain property to the defendant; in 1892 the successor of Z granted a lease of the same property to the plaintiff. The plaintiff sued the defendant and the then representative of his lessor for a declaration that the lease to the defendant by Z was invalid and for possession. The Court gave him a decree for possession, subject to the payment of a certain sum to the defendant as compensation for improvements. The defendant gave up possession of the property on receipt of the compensation money in March, 1895. The representative of the lessor proffered an appeal against the decree making the defendant a party. The High Court in August, 1897, held that the lease to the defendant by Z was valid and dismissed the plaintiff's suit.

Held, that, under S. 544, C. P. C., the decree of the High Court, of August, 1897, enured for the benefit of the defendant also; that the defendant was entitled to possession under his lease of 1880, which was never determined; that the refunding of the compensation money by the defendant was not a condition precedent to his obtaining relief by way of restitution; and that he was entitled to ask that the account might be adjusted by setting off mesne profits against the compensation money, received by the plaintiff from the time he had been wrongfully in possession up to the date of the High Court decree (August, 1897).

Civil Procedure Code—(Continued).

Held, further, that, the relief claimed by the defendant being in the nature of equitable relief,—he being bound to do equity in seeking equity, it was not equitable that he should be permitted for his own convenience, because, at the time his right to relief arose, i.e., in August, 1897, he was unable or unwilling to refund the purchase money, to postpone applying for the relief until the mesne profits had amounted to a sufficient sum to wipe off the amount of the compensation money, and that the accounts should be adjusted on the footing that the defendant had done what he ought to have done, viz., applied for restitution on the dismissal of the plaintiff's suit by the High Court in August, 1897. **Erat Madhavan Man-nadi v. Yenganat Swarapa Hill Ravi Varma**, 18 M.L.J. 39.

WHITE, C.J. and MILLER, J.

(297) S. 545—Security bond accepted by a Court does not dispense with necessity for registration—See REGISTRATION ACT (III of 1877), No. 1, 3 M.L.T. 317.

(297-a) S. 545—See No. 5 a, *supra* and No. 334, *infra*.

(298) S. 549—Appeal—Order rejecting application for rehearing of appeal dismissed under S. 549.

No appeal lies against an order refusing to re-admit an appeal rejected on the ground of the failure of the appellant to furnish security for the costs of the respondent under S. 549 of the Code of Civil Procedure. (a) **Firoz Begam v. Abdul Latif**, 5 A. L. J. 109 = A.W.N. (1908), 53 = 3 M.L.T. 921 = 30 A. 143.

AIKMAN and KABAMT HUSAIN, JJ.

Reference :—(a) 18 A. 315, R.

(299) S. 549—Rejection of appeal—Application to have it restored on furnishing the required security—Limitation.

After an appeal has been rejected under S. 549, C.P.C., the applicants may apply to have it restored on furnishing the required security.

No special period of limitation being provided for such an application, the Art. of the Limitation Act which applies is Art. 178. **Nga Lu Dok v. Mi San Baing**, U. B. R. (1908), 1st quarter, Limitation, p. 5.

G.W. SHAW, Esquire.

References :—U.B.R. (1892-96), II, 272; 8 A. 315; 18 A. 101, R.

Civil Procedure Code—(Continued).

(900) *Ss. 549 and 381—Rejection of appeal under S. 549—Application for restoration not maintainable.*

As there is no provision in S. 549 of the Code, similar to that contained in S. 381 permitting an appellant whose appeal has been rejected under S. 549 to apply for an order setting the dismissal aside, application for restoration of the appeal does not lie. **Sankaralinga Chetti v. Annama Lal Chetti**, 4 M.L.T. 416.

MILLER and PINHEY, JJ.

References:—30 A. 143, *F*; 8 A. 315, *Cons. and D.*

(300-a) S. 551—See No. 327, *supra*.

(301) *Ss. 551 and 206—Effect of dismissal of appeal—Amendment of decree—Civil Procedure Code, S. 206.*

Held, that the dismissal of an appeal under section 551 of the Code of Civil Procedure is a decree (a) and supersedes the decree of the Court below. The Court, therefore, which has taken action under section 551 is the only Court which has jurisdiction to amend the decree under S. 206 of the Code of Civil Procedure. **Aama Bibi v. Ahmad Husain**, A.W.N. 1908, 109=5 A.L.J. 584=30 A. 290.

KARANAT HUSAIN, J.

References:—(a) 24 C. 759, 4 C.I.J. 566 and 22 M. 293, *F*; 21 B. 548, *dissented from*; 15 A. 367, 2 A. 819, 26 M. 91, 10 B.L.R. 101, 16 C. 250, W.N. 1894, p. 58 and Bombay P.J. 1891, p. 239, *Refd to*.

(301-a) S. 556—See No. 2, *supra*.

(301-b) S. 558—See No. 2, *supra*.

(302) S. 559—Respondent getting a decree against a co-respondent.

A respondent cannot get a decree against a co-respondent, when he has submitted to the decree of the Court of first instance and has not filed an appeal separately. **Lehrs v. Sita**, 4 A.L.J. 772=A.W.N. (1908), 4=3 M.L.T. 176=30 A. 48.

BANKERJI and AIKIN, JJ.

Reference:—27 A. 23. *F*.

(303) S. 559—Decree made against wrong party—Appeal by that party—Decree-holder alone made respondent—Appellate Court could not bring on record persons against whom the Court of first instance should have made decree.

Civil Procedure Code—(Continued).

Looking at the language of S. 559, C.P.C. apart from authority, it would appear to have been inserted to protect parties to the suit who had not been made respondents in the appeal, from being prejudiced by modifications made behind their backs in the decree under appeal. The party whom it is sought to bring on is required to be interested in the result of the appeal, that is to say, he must be shown to be interested in the result of the appeal before he is brought on, for once he is brought he may be said to acquire an interest as a result of being brought on. When a defendant has been exonerated and there is no appeal against so much of the decree as exonerates him, no decree can be passed against him in an appeal by any other party to a suit as he is no party to such appeal, and he cannot be said to be interested in the result of such appeal by another party unless the decree sought to be obtained against the respondents in the appeal would have the effect of prejudicing him in some way or other. A decree having been made against a wrong party, it is not competent for the appellate Court, in an appeal by that party in which the decree-holder alone is made respondent, to bring on the record those persons against whom the Court of first instance should have made the decree. **Subramaniam Chetty v. Yeerabhadram Chetty**, 4 M.L.T. 104=18 M. L. J. 452.

WHITE, C.J., and WALLIS, J.

References:—5 A. 267, *F*; 25 C. 569, *not F*; 31 C. 109; 31 C. 643, *R*.

(304) S. 559—Whether respondent can be placed on record after time to appeal against him has expired—See REGISTRATION ACT, No. 4, 12 C.W.N. 625.

(305) *Ss. 560 & 588, applicability of, to appeals under Act X of 1859 (RENT RECOVERY)—See ACT X of 1859 BENGAL (RENT RECOVERY), No. 1, 7 C.L.J. 426.*

(306) S. 561—Whether cross objections, under—can be entertained by Appellate Court, in a case where no appeal lies. See MORTGAGE (REDEMPTION), No. 8, 28 P.R. 1908.

(307) S. 561—Plaintiff obtaining leave to sue in forma pauperis—Plaintiff partly successful—Memorandum of objection in forma pauperis.

Plaintiff sued the defendant as a pauper for the recovery of certain property. He obtained a decree for part of the property claimed.

Civil Procedure Code—(Continued).

Defendant appealed against this decree. Thereupon plaintiff filed objections under S. 561 of the Civil Procedure Code. *Held*, that the plaintiff may be allowed to take *in forma pauperis* any objections to the decree which he could have taken by way of appeal.

Held, further, that the provisions of Ch. XLIV, C.P.C., so far as they can be made applicable, now apply to an objection filed in accordance with S. 561, C.P.C. (a) **For Hlaing v. Ma O**, 4 L.B.R. 262.

HARTNOLL, J.

References:—(a) 1 B. 75, 8 M. 214, 11 C. 735, D.

(308) *Ss. 561, 577, 517—Plaintiff suing for possession or return of purchase money—Decree for possession—Appeal—Appellate Court decreeing return of purchase-money, legality of—Necessity for memo of objections.*

The plaintiff's case was that he purchased the plot house at a Court sale benami in the name of the defendants. He sued to recover possession from the defendant or, in the alternative, for the purchase-money paid by him for the house. The District Munsiff gave the plaintiff a decree for possession. On appeal the District Judge held that the plaintiff's suit for possession was barred by S. 317, C.P.C. He found, however, that the purchase money had been paid by the plaintiff and gave him a decree for the recovery of such sums. In second appeal by the defendant it was contended that he should not have granted the alternative relief inasmuch as the plaintiff did not put in any memorandum of objections under S. 561, C.P.C. *Held* that no memo of objections was necessary in the case. **Kuppusawmi Chetty v. Samudra Vijaya Nainar**, 4 M.L.T. 266.

MUNRO AND ABDUR RAHIM, JJ.

Reference.—29 M. 229, D.

(309) *Ss. 561 & 582 (A)—Limitation Act, S. 5—Memorandum of objection insufficiently stamped—Defect not being made good, dismissal for default—Appeal memo also insufficiently stamped—No appeal, being only against an order—No case for extension of time.*

A memorandum of objections filed by the respondent was held to be insufficiently stamped by the lower Appellate Court, which fixed a date for the deficiency to be made good. The additional stamp was not furnished, on the ground that the higher tribunal had been moved to

Civil Procedure Code—(Continued).

revise the order declaring that the objection was insufficiently stamped; and the memo of objections was, in consequence, dismissed for default. The appeal against the Appellate order was also insufficiently stamped. *Held*:

That the order, rejecting the objection as under-stamped after default made to pay the duty ordered, is an "order" and not a "decree"; and it is an order against which no appeal is provided by the Civ. Pro. Code.

Even if it be taken to be a decree, and appealable as such, the High Court, in appeal, should not interfere, unless it is established that there was in fact no default or that there was sufficient cause for excusing the default.

The failure of the party to obey an order for the filing of additional Court-fees is a default, irrespective of the legal merits of the order, and it affords no sufficient ground for excusing such default, that the party considered the order to be wrong.

The procedure of a Court cannot be regulated by what may be the opinion of a party or by what he may hope to establish against the opinion of the original Court in appeal.

There having been a wilful disobedience of an order in this case, the dismissal was but proper.

If a party feels himself aggrieved by any stamp-order, he may, within the period allowed for compliance therewith, move a higher Court against it but if he has not succeeded in getting the order set aside by the last date fixed for obedience, the party must obey the order, or subject himself to a valid disposal of the case on the ground of his default.

S. 582 A of Civ. Pro. Code has no application, inasmuch as the under-stamping was deliberate, and not due to any mistake; and this is not a case in which it will be proper to allow any extension of time under S. 5 of the Limitation Act.

The appeal to the High Court is under-stamped. (a).

No opportunity need, however, be given to the appellant for making good the deficiency in the High Court, for two reasons, namely,

(1) the appeal does not lie, and

(2) it could not now be stamped within the period allowed by the law of limitation for its due institution in the Court. **Ghasiram v. Jhingwa**, 4 N.L.R. 168.

STANYON, A.C.J.

Reference.—(a) 1st appeal No. 15 of 1904, R.

Civil Procedure Code—(Continued).

(810) *Ss. 561 & 590—Effect of latter section on former—appeals from orders.*

S. 590 of the Civ. Pro. Code makes applicable the procedure of S. 561 to appeals from orders and a memorandum of objection will lie (a) *Cellammal v. Velappa Naicker*, 3 M.L.T. 248 = 18 M. L. J. 157.

MILLER and MUNRO, JJ.

Reference:—(a) 21 A. 297, R.

(311) *S. 562—Dismissal of a suit on a preliminary point—power of Appellate Court to remand the case—Suit by reversioner to set aside an alienation by proprietor in the presence of a minor adopted son.*

Where a suit for setting aside a sale by a proprietor brought by a reversioner was dismissed on the ground that the proprietor had validly adopted a boy and that the plaintiff was therefore not competent to sue is the presence of the adopted boy, *held*, that the suit was dismissed on a preliminary point within the meaning of S. 562, and that the Appellate Court was competent to remand the case for decision on the merits (a).

Reversioners have a *locus standi* to sue for a declaration of the invalidity of a sale by a proprietor with limited powers, in the presence of the adopted son, if he is a minor (b) *Jiwa Singh v. Khazana*, 56 P.R. 1908.

RATTIGAN and SHAH DIN, JJ.

References:—(a) 109 P.R. 1887, 98 P.R. 1887, 16 M. 207 and 20 M. 25, R. (b) 24 P.R. 1877 F. 84 P.R. 1898 (F.B.) and 80 P. R. 1902, R.

(312) *S. 562—Remand order, validity of—Appellant not allowed to challenge the validity of the decision on which remand made.*

Held, that in an appeal from a decree passed after a remand under S. 562 of the Code of Civil Procedure, an appellant cannot be allowed to re-open the decision on which the remand is made. *Kotpal Sing v. Sheo Prasad Singh*, 10 O.C. 350.

CHAMBER, J.C. and GRIFFIN, A.J.C.

References:—8 A. 172, R; 6 B.H.C. 146, F.

(313) *S. 562—“Preliminary point, meaning of—Remand—Suit decided with reference to some only of the issues framed.”*

The only necessary connotation of a preliminary point in section 462 C.P.C. is that it should suffice for the disposal of the suit. Any

Civil Procedure Code—(Continued).

point the decision of which *does not enable the Court to decide the suit* is excluded from the category of a preliminary point. *Abdul Gafar Khan v. Muhammad Zia-ud-Din*, 2 P.R. 1908 (F.B.) = 12 P.W.R. 1908 = 96 P.L.R. 1908.

CLARK, C.J., CHATTERJI and SHAH DIN, JJ.

References:—49 P.R. 1902, 16 M. 207, 20 M. 25; 21 M. 172, 27 A. 691, 9 A. 30 (Footnote), 1 C.W.N. 340, R. 109 P.R. 1887, 89 P.R. 1891 (F.B.), *overruled*.

(314) *S. 562—Demand—Appeal from order of remand after decision of the suit in accordance therewith.*

Held that no appeal will lie from an order of remand passed under section 562 of the Code of Civil Procedure, if such appeal is filed after the suit has been decided in compliance with the order of remand and no appeal is preferred from the decree in the suit. *Gulzar Mal v. Kabir-un-nissa*, A.W.N. 1908, 76 = 5 A.L.J. 270 = 30 A. 191.

AIKMAN and KARAMAT HUSSAIN, JJ.

References:—29 A. 659, 32 C. 1023, F.

(315) *S. 562—Remand—Preliminary point, what is—Liability for compensation—Amount of damages.*

Where by reason of the decision on one or more of the issues recorded in the case, there has been no necessity for the consideration of the other issues, the suit was dismissed, on a preliminary point. The appellate Court finding that the issues considered were wrongly decided and the suit wrongly dismissed, remanded the case for disposal of the suit after consideration of the remaining issues:

Held, the suit was properly remanded under S. 562.

There were two questions in the case, viz., the liability of the defendant to compensate the plaintiffs, and the amount of damages. The Court of first instance held the plaintiffs were not entitled to damages and dismissed the suit on this preliminary point. On appeal, the Court of appeal held the plaintiff was entitled to damages and remanded the suit for ascertainment of damages:

Held, the remand was proper (a). *Salim Sheikh v. Nazir Khan*, 8 C.L.J. 169.

COXE and DOSS, JJ.

Reference:—(a) 16 M. 207, F.

(315-a) *S. 562—Order of remand passed by a single Judge of High Court—whether “judgment”—Letters Patent, S. 15—Appeal.*

Civil Procedure Code—(Continued).

An order of remand passed by a single Judge of the High Court, under S. 562, Civ. Pro. Code 1889, is a "judgment" within the meaning of S. 15 of the Letters Patent, because such an order disposes of the suit; and, therefore, an appeal lies from such an order. **Gopinath Pati v. Moheswar Pradhan**, 85 C. 1096.

RAMPINI, A.C.J., DOSS, J.

Reference:—Unreported, dated 19th July 1907 in Second appeal No. 2089 of 1906, F.

(316) S. 562—Suit for partition—Remand—Appeal—Court fee—See **APPEAL GENERAL**, No. 3, A. W. N. 1908, 40.

(317) S. 562—Declaratory suit relating to two pieces of land dismissed *in toto* by the first Court upon preliminary point—Appellate Court dismissing the suit as to one piece, and remanding the case as to the other piece—Inapplicability of S. 562—Illegality of order—Scope of appeal from order of remand. See **APPEAL (GENERAL)**, No. 3-d, 149 P. W. R. 1908

(317-a) S. 562—See No. 97, *supra*, and No. 347, *infra*:

(317-b) Ss. 562, 564—Appellate Court, has power to remand the case for second decision except as provided by S. 562.

The language of S. 564, Civ. Pro. Code prohibits an appellate Court from remanding a case for second decision except as provided in S. 562. **Aziman v. Bhuria**, 138 P.R. 1908.

LAL CHAND, J.

Reference:—16 M. 299 (P. C.), F. 23 A. 167, 28 M. 445, R.

(318) Ss. 562, 564, and 578—Remand by Lower Appellate Court—First Court's decision not on a preliminary point, but on the merits—Legality of remand order—Proceedings subsequent to remand—Nullity—Consent or waiver.

When a Court of first instance decided the suit, not upon a preliminary point, but on the merits, the Lower Appellate Court remanded the case under S. 562, C.P.C., for having a new plan prepared. Held that the order of remand was illegal. (a)

Even though the plaintiff was not prejudiced by the order of remand, the High Court had jurisdiction to interfere with the remand.

The illegal remand could not be treated as a mere irregularity, (b) and S. 578, C.P.C., has no application.

Civil Procedure Code—(Continued).

The illegality is not cured by the plaintiff's consent or waiver.

Failure on plaintiff's part to appeal under Cl. (28) of S. 588 cannot be treated as consent or waiver, (c) as he had the alternative remedy of taking objection to the remand in second appeal (d).

Nor was it in the power of the plaintiff to prevent the trial, after remand, before the first Court from going on.

The High Court had no alternative but to set aside all the proceedings subsequent to the remand—the decree of the Lower Appellate Court, the second decree of the first Court and the remand order of the Lower Appellate Court and to remand the original appeal to the Lower Appellate Court for disposal according to law. **Pallin Chetty v. Rangiadoss Naidu**, 4 M.L.T. 479.

MUNRO and PINHEY, J.

References:—(a) 18 M. 421 & 19 M. 479, App. & F. 28 M. 430, R. (b) 24 M. 61 (P.C.), F. (c) 28 M. 437 Discussed. (d) 18 M. 421. F.

(319) Ss. 562 and 566—Contract made on behalf of a minor—Joint Hindu Family—Remand.

The ruling in **Mohori Bibi v. Dharmo Das Ghose**, I.L.R. 30 Cal. 539 (P.C.) only declares that a contract made by a minor is void and not voidable, and does not apply to the case in which a contract is entered into by person of full age on behalf of a minor belonging to a joint family.

Where no new issues have to be framed; but only such of the issues as the first court left entirely undecided are to be determined, the court of appeal is justified in sending the case back under section 562 of the Code of Civil Procedure (a) **Meghan Dube v. Pran Singh**, 5 A.L.J. 14 = A.W.N. (1908), 10 = 30 A. 63.

BANERJI and RICHARDS, JJ.

Reference:—(a) 27 A. 11, 691, R.

(320) Ss. 562, 588 and 591—Order of remand appeal from, after decree in suit—See **PRACTICE** No. 9, 5 A. L. J. 447 (F. B.)

(321) Ss. 562 and 588 (28)—Appeal from remand order—Chief Court's power to go into merits of case.

In an appeal under S. 588 (28) against a remand order under S. 562, as soon as it is held that the remand order appealed is not warranted by the terms of the section, inasmuch as

Civil Procedure Code—(Continued).

the case has not been disposed of by the Court of first instance upon a preliminary point, the Chief Court cannot enter upon, or in any way deal with, the spurious preliminary point, which the Lower Appellate Court had wrongly held to justify the remand order. **Imam Bibi v. Ghulam Hussain**, 38 P. R. 1908=86 P. W. R. 1908=177 P. L. R. 1908.

REID, J.

References.—1 P. R. 1903; 6 P. R. 1892, R. (322) Ss. 562 and 595—*Appeal to Privy Council—Order of remand under S. 562 whether a final decree.*

Where a case was remanded under S. 562 of the Code by the Chief Court, the order of remand cannot be said to be a final decree under S. 595, cl. (a), and an application for leave to appeal to the Privy Council from such order will not be granted under S. 595, cl. (a), even though the value of the suit is sufficient to warrant an appeal. **Sohan Singh v. Jahandad Khan**, 52 P. R. 1907=34 P. L. R. 1908=119 P. W. R. 1908.

JOHNSTONE and RATTIGAN, JJ.

References.—1 A. 726, 25 A. 629, 6 B. 260 and 8 B. 548, R.; 17 A. 112, *Expt.*

(322-a) Ss. 562 and 595—*Final order—Preliminary point—Res judicata—“Evidence of essential facts.”*

Held, that S. 562 of the Civ. Pro. Code applies to a case decided on a point of law on such materials as are available before the parties prove disputed documents or adduce oral evidence.

On reference to 1 L. R. 17 A. 112, *held*, that by the words “evidence of essential facts,” their Lordships meant evidence of facts essential to the disposal of the case and not merely essential to the question which has been decided. (a).

Held, further, that an order of remand which will not necessarily have any effect on the ultimate decision of the case was not a final order within the meaning of S. 595 of the Code of Civ. Procedure, (b) **Jamna Prasad v. Radha Kishan**, 11. O. C. 169.

* CHAMBER and EVANS, J. CS.

References.—(a) 17 A. 112 *Expt.* and D. (b) 1 O. C. 205, 2 C. W. N. 4000, P. C. App. 22 of 1906, R.; and 15 B. 115, D.

(322-b) S. 564—See No. 318, *supra*.

Civil Procedure Code—(Continued).

(322-c) S. 566—See No. 319, *supra*

(323) Ss. 568 and 523—*Additional evidence on appeal, when admissible.*

The legitimate occasion for S. 568 is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, not where a discovery is made, outside the Court of fresh evidence and the application is made to import it. That is the subject of the separate enactment in S. 623. **Krishnamachariar v. Narasimha Charlar**, 3 M. L. T. 308=31 M. 114.

WHITE, C.J. and MILLER, J.

reference.—31 B. 381, F.

(324) S. 574—*Issues—Court should raise proper issues—Practice.*

Per Chandavarkar, J.—“We wish to impress upon the lower Courts of appeal the necessity of always raising points for determination, as required by the provisions of the Civil Procedure Code, in every appeal, before it is argued, because they narrow the points in controversy and leave little or no room for complaint in second appeals.” **Govind Dattu Konari v. Yesuji Khandoji**, 10 Bom. L. R. 492.

CHANDAVARKAR and KNIGHT, JJ.

(325) S. 574—*Judgment of the Lower Court not complying with—Procedure.*

When, in second appeal, it appears that the judgment of the lower Appellate Court does not substantially comply with the requirements of S. 574, C. P. C., the proper procedure is to make an order setting aside the decree, and remanding the case to the lower Appellate Court to be disposed of according to law (a).

If the judge of the Court to which the case is remanded is the judge who heard the appeal in the first instance, and if he considers that he can properly dispose of the remanded case without a re-hearing of the appeal, the writing of a judgment which satisfies the requirements of S. 574, without re-hearing the appeal, would be a compliance with the order that the case be disposed of according to law. But in all cases, where the judge of the Court to which the case is remanded, is not the judge who heard the appeal in the first instance, and in all cases where the judge of the Court is the judge who heard the appeal in the first instance, but he does not consider that he can properly dispose of the remanded case without a re-hearing of the appeal, a re-hearing is neces-

Civil Procedure Code—(Continued).

sary in order that there may be a compliance with the order the High Court that the case be disposed of according to law. **Saravana Pillai v. T. Sesha Reddi**, 3 M.L.T. 71 (F.B.)=18 M. L.J. 84.

WHITE, C.J., WALLIS and MILLER, JJ.

References:—20 M. 496; 22 M. 12; 25 C. 97, 17 B. 428; 19 B. 551, *R* and *F.* 4 M.H.C.R. 174, *dissented from*.

(326) S. 574—Case where a judgment was held not to sufficiently comply with express provisions of section—See **EJECTMENT**, No. 6, 14 Bur. L.R. 156.

(327) *Ss. 574 and 551—Procedure—Appeal summarily dismissed—Court not bound to record full judgment.*

Held, that the provisions of section 574 of the Code of Civil Procedure are not applicable in their entirety to the case of an appeal dismissed under section 551 of the Code. **Samin Hasan v. Piran**, A.W.N. (1908), 115=5 A.L.J. 300=30 A. 319.

BURKITT and AIKMAN, JJ.

Reference:—25 C. 97, *dissented from*.

(327-a) *Ss. 574, 578, 584—Appellate judgment—Omission to state reasons for decision—Defect if curable—Ground of second appeal.*

In a suit on a mortgage bond, the defence of the contesting defendant was that the bond was executed by collusion between the plaintiff and certain other defendants who did not appear. The Lower Appellate Court recited that the Court of first instance had found that the plaintiff was entitled to no relief, and then concluded as follows:—"The point in dispute is a question of fact and I see no reason to differ from the finding of the Lower Court. The appeal is dismissed."

Held, that the appellate judgment did not comply with the provisions of S. 574, Civ. Pro. Code. The points for determination were set out, but the reasons for the decision were not stated.

Held, also, that the facts of the case demanded fuller treatment than they received, and the defect was not cured by the provisions of S. 578 of the Code.

Defect in the appellate judgment is a ground of second appeal. (a) **Shaharulla Mondal v. Bangoo Mondal**, 18 C.W.N. 148.

STEPHEN and HOLWOOD, JJ.

Reference:—(a) 12 C. 199 D.

Civil Procedure Code—(Continued).

(328) S. 575—*Reference by Bench to another Judge or Judges—Competency of the latter Judge or Judges to deal with the whole appeal.*

When an appeal is referred by a Bench of the court, to one or more Judge of that Court, under S. 575 of the C.P.C., the whole appeal, and not merely the point or points, on which the reference is made, can be dealt with and disposed of by the Judge or Judges to whom the reference was made. **Maung Po Te v. Maung Po Then**, 14 Bur. L. R. 59 (F.B.).

FOX, O.C.J., BIGGE, IRWIN and HARTNOLL, JJ.

(329) S. 575—Two Judges hearing an appeal and differing in their opinions—Whether appeal should be dismissed. See **PRACTICE**, No. 11, 14 Bur. L. R. 257.

(329-a) S. 577—See No. 308, *supra*.

(330) S. 578—*Misjoinder of different causes of action whether cured by—Damage of two persons by same tortious act—Right to sue as joint plaintiffs.*

Damage was caused to two members of a firm by the same wrongful act of the defendant. The two members brought a suit as co-plaintiffs for damages. But the plaint was so framed that each plaintiff was suing, individually, for the injury to his personal reputation and credit. *Held*, that, in such a case, each plaintiff had a different cause of action, and that the joint suit was not maintainable. But the two plaintiffs might, had they so chosen, have instituted an action for the joint damage suffered by the firm.

Though it is open to plaintiffs in England to join in one suit distinct causes of action under certain circumstances, there is no such privilege conferred by the Code of Civil Procedure. Under the Code, the plaintiff can do so only in respect of the same cause of action.

The powers of the Courts are derived in India entirely from Legislative enactments, and their jurisdiction does not commence till a suit has been instituted in the manner allowed by law. Hence, misjoinder of causes of action is not cured by the provisions of S. 578, C. P. C. **Mangham Mal Rochiram v. Michuma Rowachand**, 1 Sind. L. R. (Civil), 181.

CROUCH and HAYWARD, JJ.

Reference:—11 C. 524, 26 B. 259, 34 C. 552, *R.*

Civil Procedure Code—(Continued).

(331) S. 578—*Defects in signing etc. of plaint.*

Where a plaint on behalf of Government was signed by the Collector and by a Pleader who was not the Government Pleader, but who generally acted for Government and the verification was signed by the Collector and the Government Pleader.

Held, per RAMPINI, J.—That the plaint was properly presented.

Per, curiam—That the defects, if any, in the signing and verification of the plaint, were cured by S. 578. **Rakhal Chandra Tewary v. The Secretary of State for India in Council**, 10 C.W.N. 841=8 C.L.J. 34.

RAMPINI and WOODROFFE, JJ.

(332) S. 578—Ground of second appeal not affecting the jurisdiction of the Court or the merits of the case, but relating to order of lower appellate Court remanding case for amendment of plaint—whether second appeal lies on such grounds—See APPEAL SECOND APPEAL No. 1-a, 14 Bur. L. R. 122.

(332-a) S. 578—See No. 60, 254, and 318, 327-a *supra*.

(332-b) S. 582—See No. 235, *supra*.

(332-c) S. 582 (a)—See No. 309, *supra*.

(333) S. 583—*Restitution—Right to apply not confined to parties to appeal—Rights accruing during litigation.*

It is not necessary that a person asking for restitution under S. 583, C.P.C., should have been a party to the successful appeal, if the appeal is in effect and substance in favour of such a party.

Under S. 583, C.P.C., the parties must be placed in the position they were previously in, irrespective of any other rights accruing to any of the parties during the litigation. **Gunga Prasad v. Brojo Nath Das**, 12 C.W.N. 642.

MITRA and CASPERSZ, JJ.

(338-a) S. 593—See No. 161, *supra*.

(334) Ss. 583, 545 and 253—*Method of enforcing security bond given under S. 545.*

The effect of S. 583, read with S. 253 is that the proper method of enforcing a security bond given under S. 545, is by execution. **Lalla Dabee Narayana Lall v. Mohan Panday**, 4 L. B. R. 197=14 Bur. L. R. 170.

IRWIN, J.

References:—12 B. 411; 23 B. 478; 25 B. 409, 13 M. 1. 174. 99, F; 15 C. 497; 22 C. 25 C. 212, Diss.

Civil Procedure Code—(Continued).

(335) S. 584—*Second appeal*—See *Charter Act*, No. 13 C.W.N. 105.

(335a) S. 584—See No. 2, 100, 327, a *supra*.

(336) Ss. 584, 591, 623, and 629—*Review of judgment granted for "any other sufficient reason"*—*Objection against the order appeal from final decree.*

Ss. 584 and 591 of the Code do not control S. 629, so as to confer a right of appeal in a case, where the appeal is not based on one of the objections mentioned in S. 629.

An objection against the order of admission of an application for review of judgment cannot be taken in an appeal against the final decree except on one of the grounds mentioned, as grounds of objections in S. 629.

Where an application for review of judgment is granted for "any other sufficient reason" under S. 623 of the Code, the sufficiency or otherwise of the reason is not a good ground of appeal against the order (a). **Gopala Aiyar v. Ramaswami Sastry**, 17 M.L.J. 603=2 M. L.T. 519=31 M. 49.

WHITE, C.J., and BENSON, J.

References:—(a) 27 A. 695, 24 C. 878, F; 23 M. 314, D.

(337) S. 586—*Second appeal—Pecuniary limit—Practice—Issue—Indian Contract Act (IX of 1872), S. 231—Contract by Agent with third parties, where principal is undisclosed—"Discloses himself."*

S. 586 of the Civ. Pro. Code contemplates rather the original character of the suit than the character which it may subsequently assume by operation of findings of the Courts.

Where the rights in a case have to be determined by reference to the words of the legislature, then those words should be used for the purpose of the issues so far as circumstances permit.

S. 231 of the Indian Contract Act deals with the rights (a) of the principal and (b) of the third party in cases where the contract is entered into by the agent without disclosing his principal. The first clause refers to the general cases where the rule is that the third party shall have as against the undisclosed principal the same rights which he would have had as against the agent if the agent had been the principal. The second clause deals with the particular case where the principal discloses himself before the contract is completed. The second clause should be read as governed by the preceding clause.

Civil Procedure Code—(Continued).

The words "discloses himself" in S. 231 of the Indian Contract Act must be construed strictly. The third party's right to repudiate the contract arises only where the principal himself makes the disclosure; it cannot arise where the disclosure is made by some other person or the information reaches him from some other source. **Lakshumandas Narayandas v. Anna R. Lane**, 6 Bom. L.R. 731—32 B. 356.

JENKINS, C.J. and BATCHELOR, J.

(338) S. 586—*Provincial Small Cause Courts Act (IX of 1877), Sch. I, Art. 31—Suit of a Small Cause Court nature—Second appeal—High Court.*

The plaintiff sued to recover from the defendants Rs. 120 as the value of his share in the produce of certain lands alleged to belong jointly to him and the defendants. This right was denied in the written statement. The lower Courts dismissed the suit. On second appeal, a preliminary objection was taken that no second appeal lay, as the suit was of a Small Cause nature:

Held, upholding the objection that no second appeal lay. The question of title arose incidentally and did not, therefore, remove the suit from the cognizance of the Court of Small Causes (a) **Kearisang Banerang v. Naranang Manabhai**, 10 Bom. L.R. 733.

BATCHELOR and CHAUBAL, JJ.

References—(a) 17 B. 42 and 21 B. 248, F. (339) S. 587—Talana not paid within fixed period—Appeal whether can be dismissed for default—See APPEAL, (GENERAL), No. 3-a 35 C. 535.

(340) S. 588—*Insolvency proceedings, order by Subordinate Judge in—Appeal.*

An appeal lies, against an order of a Subordinate Judge passed on an insolvency petition presented in execution of a small cause decree, to the District Court, under S. 588, C. P. C., and not to the High Court, **Sami Aiyar v. Aylam Vythi Pattar**, 4 M.L.T. 455.

MUNRO & PINNEY, JJ.

References—12 M. 472, 15 M. 89, 23 A. 56; 27 B. 604, *Relied on*; 17 M. 377, *Not F.*

(341) S. 588—Appeal dismissed for default—Mistake of pleader—Application to have appeal reopened—Opportunity to be given to applicant to prove sufficient cause for non-appearance—See LIMITATION ACT, No. 4, U. B. R. (1907), Third Quarter, Limitation, 1.

Civil Procedure Code—(Continued).

(341-a) S. 588—See Nos. 2, 76, 89, 207, 208, 211, 305 and 320, *supra*.

(341-b) S. 588 (b)—See No. 58, *supra*.

(341-c) S. 588 (c)—See No. 5, *supra*.

(341-d) S. 588 (17)—See No. 225, *supra*.

(341-e) S. 588 (18)—See No. 227, *supra*.

(341-f) S. 588 (24)—See No. 271, *supra*.

(341-g) S. 588 (28)—See No. 321, *supra*.

(341-h) S. 589—See Nos. 76 & 225, *supra*.

(341-i) S. 590—See No. 310, *supra*.

(341-j) S. 591—See Nos. 98, 281 265 a, 320 & 336, *supra* a.

(341-k) S. 592—See Nos. 245 & 246, *supra*.

(343) S. 595—"Final decree"—Order of remand—Suit to annul incumbrances—Bengal Tenancy Act (V III of 1885), S. 167—Notice—Dismissal of suit on the ground of nonservice of notice—Appellate Court holding service proved and remanding case.

Where a suit to annul incumbrances by the purchaser of a *putni* at a sale for its own arrears was dismissed by the Subordinate Judge, on the ground that the plaintiff had failed to prove the service of notices under S. 167, Bengal Tenancy Act, but the High Court, on appeal held that the service of notices was proved and remanded the suit for the trial of the other issues in the case.

Held, that though the order of the High Court was in form an order of remand, it finally decided the cardinal point in the case, viz, whether the notices were properly served or not. The order was therefore a "final decree" within the meaning of S. 595 of the Civ. Pro. Code (a) **Ananda Gopal Gossain v. Naffor Chandra Pal Chowdhury**, 12 C.W.N. 545=35 C. 618=8 C.L.J. 168.

MACLEAN, C.J. and DOSS, J.

Reference—(a) 17 A. 113 and 15 B. 155, R.

(344) S. 595—*Final decree passed on appeal—High Court—Appeal—Privy Council—High Court's order refusing to admit appeal beyond prescribed period.*

An order passed by the High Court, refusing to admit an appeal presented beyond the prescribed period, is not a "decree passed on appeal" under S. 595 (a) of the Code of Civil Procedure, and is, therefore, not appealable to His Majesty in Council. **Karsondas Dharamsey v. Gangabai**, 9 Bom. L.R. 566=32 B. 108 (On appeal from 7 Bom. L.R. 965=30 B. 829).

JENKINS, C.J. and PRATT, J.

Reference—30 C. 679, F.

Civil Procedure Code—(Continued).

(344-a) S. 595—See Nos. 322 & 322 A, *supra*.

(345) S. 596—*Appeal to His Majesty in Council*—"Substantial question of law"—*What is a question of fact—Leave to appeal refused.*

The main question at issue in a suit for partition of movable and immovable property being whether the family was or was not joint in title and interest, the defendants, on being asked what they would call evidence to prove, set down a series of facts which they alleged that they could prove, and which, they contended, indicated that the family was, at the time of suit, joint as to property as well as in other respects. The plaintiff admitted the facts so alleged, and the parties therefore summoned no witnesses on either side. Some documentary evidence, however, was put in, mainly consisting of the will of the late head of the family.

Held that the finding on these data as to what was the status of the family was a finding of fact merely and could involve no "substantial question of law" within the meaning of section 596 of the Code. **Parotam Rao Tantia v. Janki Bai**, A.W.N. (1908) 7 3 M. L. T. 169.

STANLEY, C. J. and BURKITT, J.

(346) S. 596—*Appeal—Amendment of decree by way of amplification of its wording—Affirmation—See APPEAL TO PRIVY COUNCIL*, No. 1 62 P. W. R. 1908.

(347) Ss. 596 and 562—*Appeal to his Majesty in Council—Appeal from order of remand not usually admissible.*

An order under section 562 of the Code is not ordinarily capable of being the subject of an appeal to His Majesty in Council, though it may possibly be so, if the order in question has the effect of deciding finally the cardinal point in the suit. **Ram Sarap v. Ram Del**, A.W.N. (1907), 291=5 A.L.J. 57.

STANLEY, C.J. and BURKITT, J.

References :—A.W.N. (1903) 159, 2 C.W.N. p. cci, 12.

(348) S. 602—*Power of Court to extend time for giving security—Appeal to Privy Council.*

The words of S. 602 C.P. C. though at first sight may appear to be mandatory yet are merely directory (a). The Court admitting the appeal (the Chief Court), therefore, can, for sufficient cause, extend the period prescribed by that section for the filing of security and for

Civil Procedure Code—(Continued).

making the specified deposit. **Kidar Nath v. Mathu Mal**, 87 P. R. 1908=153 P.W.R. 1908.

JOHNSTONE and RATTIGAN, JJ.

Reference :—(a) 10 C. 537 (P.C. R.)

(348-a) S. 617—See Nos. 119, 176, 187, *supra*.

(349) S. 622—*Conditions under which High Court can interfere with order of court below—Revision—Erroneous decision on question of law.*

Under S. 622, C.P.C., the High Court can interfere in revision with the order of the Court below only when the latter has acted illegally or without jurisdiction, and the fact that it may have been wrong on a question of law is not a reason for the High Court to interfere. **Subramania Othuvay v. Munuswami Pillai**, 3 M L T. 262.

SANKARAN NAIK, J.

(350) S. 622—*Charter Act, S 15—Analogous appeals in superior and inferior Courts—Duty of inferior Court to await decision of superior Court.*

The High Court has powers either under S. 622, C. P. C. or if not, under S 15 of the Charter Act to interfere in cases where the lower Courts have not acted correctly in accordance with law.

Where a plaintiff failed to secure the production of an important document from the records of another Court though he took all reasonable steps for that purpose and the suit was disposed of by both the Court of first instance and the Appellate Court without reference to that document the High Court in revision set aside the judgments of both the Courts.

When appeals preferred in analogous cases are pending, some in an inferior and others in a superior appellate Court, the inferior Court of Appeal would exercise a wise discretion to await the decision of the superior appellate Court. **Mohant Gobind Ramanuja Das v. Lakhun Parida**, 11 C.W.N. 112=8 C.L.J. 43.

BRETT & GUPTA, JJ.

(351) S. 622—See Nos. 115, 193, 208, 265-a, *supra*.

(352) S. 622—*Revision, when allowed.*

Held, that, where there is no irregularity or want of jurisdiction, the order of the Lower Court even if erroneous, cannot be disturbed in revision (a) **Dwarka Prasad Singh v. Janki Prasad Singh**, 11 O.C. 238.

CHAMBER and GREENE, JCS.

References :—(a) 18 B. 35 ; 6 C.W.N. 57 disapproved.

Civil Procedure Code—(Continued).

(353) *S. 622—Presidency Small Causes Court Act, S. 69—Difference of opinion among the Judges constituting the Full Bench—Disposal of the case according to the opinion of the majority—Legality—Jurisdiction of the High Court.*

The Presidency Courts of Small Causes are Courts subordinate to the High Court and there is nothing in the language of S. 622 of the Code or in any other provision in the Code or the Presidency Small Causes Courts Act which may be said to indicate an intention on the part of the legislature to exclude such Courts from the application of S. 622 of the Code (a).

The fact that no formal order was made granting a new trial would not preclude the case from the operation of S. 69 if the Judges purported to deal afresh with the merits of the case (b), *P. Rangiah Naidu v. G. Rangiah*, 4 M.L.T. 288.

MUNRO and ABDUR RAHIM, JJ.

References:—(a) 11 C. 261, 24 C. 455, 19 M. 96, 20 M. 358, 21 M. 282, 26 M. 163, R. (b) 20 M. 358, R.

(354) *S. 622—Petition for revision—Act XV of 1882 (Presidency Small Cause Courts Act). S. 38—Without making application to Full Bench.*

Except in very special cases, the High Court will not interfere under S. 622, C. P. C., when the party aggrieved has a remedy elsewhere, e.g., by an application under S. 38 of the Presidency Small Cause Courts Act. *Signor Coppa Angela v. D'Angels*, 4 M.L.T. 325.

MILLER and SANKARAN NAIR, JJ.

(355) *S. 722—Criminal Procedure Code, ss. 195, 439—Revision—Act No. XVIII of 1879 (Legal Practitioners Act) s. 14—Jurisdiction.*

A complaint made by letter by a litigant to the Subordinate Judge charging a pleader with professional misconduct was "filed" by the Subordinate Judge; but on a similar complaint being sent to the District Judge, the District Judge having inquired into its authenticity, sent it to the Subordinate Judge for inquiry and report. The Subordinate Judge thereupon instituted an inquiry under section 14 of the Legal Practitioners Act, as a result of which he granted sanction to the Pleader to prosecute for perjury one of the witnesses who had appeared before him in the course of the inquiry, and this order was confirmed by the District Judge.

Civil Procedure Code—(Continued).

Held that the High Court had no jurisdiction to interfere with the order of the Subordinate Judge under either section 195 or section 439 of the Code of Criminal Procedure; nor could it interfere under Section 622 of the Code of Civil Procedure, inasmuch as the Subordinate Judge (though he possibly mistook the meaning of the District Judge's order addressed to him) had jurisdiction to inquire into the truth of the charge made against the pleader. *Mahar Hasan v. Said Hasan*, A.W.N. (1908) 273.

RICHARDS and GRIFFIN, JJ.

(355-a) *S. 622—Question of Limitation wrongly decided—Not a sufficient ground for interference under.*

Erroneous decision of the lower Court on the question of limitation, though it amounts to an error of law and a ground for second appeal, is not a ground for interference in revision under S. 622, C.P.C., (Act XIV of 1882). *Durl v. Mohanlal*, 4 N.L.R. 184.

SKINNER, A.J.C.

*References:—*11 C. 6, 15 A. 139, 16 A. 39, 20 A. 78, 11B. 488 (492), 9 M. 118, 11 C. 6, 11 M. 220 (226) 21 C. 799, 15 C. 446 and 12 C.P. L.R. 112.

(355-b) *S. 622—No interference by the High Court where the right result has been reached by the Lower Court—Jurisdiction of the lower Court to review wrong order.*

Where a Court passed an order under a wrong section, it has jurisdiction to review the wrong order for sufficient reason; and the High Court will not interfere under S. 622, if the right result has been reached and that which was irregularly done has been set right. *Bollapragada Garu Narayan Row v. Bolla Pragada Janki Ramiah Garu*, 31 M. 414.

MILLER, J.

*Reference:—*16 M. 424, R.

(355-c) *S. 622—Material irregularity—Mistaken view of the law by the Lower Court*

The Lower Court's decree should not be reversed by the High Court under S. 622, C.P.C., merely because a mistake in law is made. But where the mistake of law is caused by the case not being properly heard, then there will be interference by the High Court on the ground of material irregularity. *Durahmani Reddi v. Muthial Reddi*, 31 M. 458.

MILLER, J.

*Reference:—*26 M. 330.

Civil Procedure Code—(Continued).

(356) S. 622, powers of revision given to High Court, and by S. 25, Provincial Small Cause Courts Act, relation between—See SMALL CAUSE COURTS ACT (IX OF 1887), No. 1, 5 A.L.J. 295.

(357) S. 622—Appeal entertained without jurisdiction—Procedure for setting aside—See ACT VIII OF 1885 (TENANCY, BENGAL), No. 23, 12 C.W.N. 835.

(358) S. 622—Sanction to prosecute refused by Court of first instance in respect of certain contradictions made by a defendant in two different suits between the same parties—District Judge according sanction—Whether High Court will interfere under S. 622 of Civ. Pro. Code or S. 499, Crim. Pro. Code. See CRIM. PRO. CODE, No. 5, 4 N.L.R. 140.

(359) S. 622—Proceedings instituted by District Judge under S. 476, Crim. Pro. Code—Whether High Court, on civil side, can stay criminal proceedings. See CRIM. PRO. CODE, No. 7, 35 C. 909.

(359-a) S. 622 Compensation money paid to Hindu widow—Reversioner's application for reference to Civil Court—Order by Judge on reference directing refund of money already paid by Collector—Order not one under S. 32, Land Acquisition Act—Incompetency of Judge to proceed under S. 32—No appeal from order under S. 32—Power of High Court to interfere in revision. See ACT I OF 1894 (LAND ACQUISITION), No. 19, 12 C.W.N. 1039.

(359-b) Ss. 622 and 283—Desirability of acting under where other remedies available.

On an application to the High Court against the order of a Subordinate Judge, where the applicant had a right of suit under S. 283, C.P.C., it was held that even in cases where the powers under S. 622, C.P.C. might be properly exercised, it was undesirable to apply those special powers when relief could be obtained by the ordinary procedure. **Santdas Dayaldas v. Mangatram Bhojraja**, 1 S.L.R. 226.

KNIGHT and CROUCH, J CS.

(360) Ss. 622 and 311—Representatives of decree-holder held by Court below to have been properly brought in—Decree-holder applying for execution before realization—Right of his representatives to rateable distribution—Objection.

Where a District Judge had on appeal decided that the representatives of a decree-holder had been properly brought in, held, that the

Civil Procedure Code—(Continued).

High Court ought not to interfere in revision with his decision on a point of this kind (a).

Where a decree holder had applied for execution before the realization, his representatives were held to be entitled to a rateable distribution and consequently to object under S. 311, C.P.C. (b). **Arunagari Mudali v. Yadivelu Mudali**, 3 M.L.T. 249.

WALLIS and MILLER, JJ.

References:—(a) 21 A. 291 & 24 M. 447, F. (b) 10 M. 57, R.

(361) Ss. 622 and 623—Ground for review.

The ground for amending a decree on review must be something which existed at the date of the decree.

Where the only ground relied on was an action of the defendant subsequent to the decree it was held that it could not furnish any ground for review. **Annamalal Chettiar, U.R.M.N.M. v. Subramania Iyer**, 4 M. L. T. 86.

WALLIS and MUNRO, JJ.

References:—24 M. 1, F; 13 B. 330, not F.

(361-a) S. 623—Sec. Nos. 96, 108, 323, 336 and 361, *supra*.

(362 & 363) Ss. 623, 624 Decree rendered ineffectual by subsequent decree—Former decree not to be considered as reversed—Proper remedy of judgment-creditor is under S. 624—New and important matter.

The proper remedy for a judgment-creditor, a decree in whose favour was rendered wholly ineffectual by virtue of a decree passed in another suit, was by application for review of the original case, under S. 624, C.P.C., the latter decree being treated as new and important matter; and not under S. 623 as the decree in the original case cannot be treated as having been reversed by the subsequent decree. **Satramdas Jeramdas v. Missir Mangalmal**, 1 S. L. R. 227.

KNIGHT and CROUCH, A.J. CS.

Reference:—10 B. 388, R.

(360 a) Ss. 623 & 626—Discovery of new and important matter—Review of judgment of Appellate Court—Due diligence.

Where a defendant applied for review of the judgment on the ground of the discovery of new and important evidence consisting of an old release deed executed by one of his ancestors and stated that the deed was discovered when he happened to dust one of the four or five books in a shelf in one of the only two rooms in his

Civil Procedure Code—(Concluded).

house, held that the defendant's statement did not prove due diligence and that, as the place from which the document was discovered was not an unnatural place to search for the document and as the document was of very great importance, the application should be dismissed. **Harjimal Dhamal v. Bhejanmal**, 2 Sind. L. 35 (F.B.).

PRATT, J.C. and CROUCH and HAYWARD, A.J. c.s.

References:—81 B 81—9 Bom. L. R., 61, R. (368-b) S. 624—See No. 79 & 363, *supra*.

(363-c) S. 626—See No. 363, *supra*

(363-d) S. 629—See Nos. 79 & 336, *supra*.

(364) S. 647, deals only with procedure—It does not empower the District Judge to refer a dispute about guardianship of minor to arbitration—See ACT VIII of 1890 GUARDIANS AND WARDS) No. 1, 5 A.L.J. 101.

(364-a) S. 647—See No. 89 and 90, *supra*.

(364-b) S. 648—See No. 115, *supra*.

(364-c) S. 649—See No. 130, *supra*.

(365) S. 652—Power of High Court in framing rules under—See HIGH COURT RULES (BOMBAY), No. 1, 9 Bom. L.R. 1138=2 M.L.T. 410 (F.B.) = 32 B. 14.

(366) Ch. XXXIX, applicability of, where defendant is agriculturist—See JURISDICTION (OF SMALL CAUSE COURT), No. 1, 1 S.L.R. 243.

Commission.

(1) *Commission for examination of persons not exempted by G.P.C.—Jurisdiction of Civil Court to issue such commission—Legality.*

A Civil Court has no jurisdiction to issue a commission for the examination of a witness on grounds other than those mentioned in the Civ. Pro. Code; such jurisdiction is only conferred in the case of persons who are exempted under the Code from attendance, or are unable from sickness or infirmity to attend.

The High Court has power to interfere, under S. 15 of the Charter Act, with the orders of Subordinate Courts passed without jurisdiction (a) **Somasundram Chettiar v. Manickavasaka Desika Gnanasambanda Pandara Sunnadhi**, 3 M.L.T. 246=31 M.60.

WALLIS and MILLER, JJ

Reference:—(a) 9 C. 295 (P.C.), F.

(2) *Evidence of purdanashin lady taken on, in behalf of defendant—Plaintiff's right to refer*

Commission—(Concluded).

to such evidence—Practice—Fee Civ. Pro. Code No. 242, 35 C. 28.

Commissioner.

Special Commissioner—Power to sell—Vesting the property in the special Commissioner—Procedure. See PRACTICE, No. 14, 10 Bom. L. R. 1176.

Committee of a lunatic.

Remuneration to a—Court's jurisdiction to pass the order—Right of lunatic when sane to impeach the order—See ACT XXXIV of 1858 (LUNACY, SUPREME COURT), No. 1, 10 Bom. L. R. 772.

Companies Act.

See ACT VI OF 1882.

Company.

(1) *Contract with a Company—Memorandum and Articles of Association—Commission contract—Contract with promoters.*

The Memorandum and Articles of Association of a Company embody only the social contract that is, a contract between the share-holders *inter se*, and possibly between the share-holders and the directors, and do not constitute any contract between the Company and its promoters. **Ahmedabad Jubilee S. & M. Co. v. Chhotalal Chhaganlal**, 10 Bom. L.R. 141=3 M. L. T. 197.

JENKINS, C.J. and BATCHELOR, J.

(2) *Right of share-holder of company to inspect books and take extracts—Special interest and a definite object, necessary—See CORPORATION, No. 1, 12 C.W.N. 825 (P.C.).*

Compensation.

(1) *Apportionment of, principal of—Maurasidar—Durmaurasidar—Enhancement—Contract of tenancy—Transfer of Property Act—Durmaurasid mokarari, what it connotes—Rent, abatement of—Contingency, value of, onus of proof, on whom.*

The Transfer of Property Act gives no authority to a landlord to enhance the rent of his tenant during the term of the lease, whether it be in perpetuity or for a definite term.

The word *maurasidar* does not convey the idea of a right to fixity of rent; *durmaurasid mokarari* implies fixity of rent.

The right of enhancement is not an incident of every contract of Tenancy.

Compensation—(Concluded).

In a proceeding for appointment under the Land Acquisition Act, no abatement of rent can be made without the consent of the parties.

The compensation is to be apportioned between the parties according to the value of the interest which each of them parts with. The Zemindar has a right to the fixed rent and the loss he sustained is of so much of his rent. Any other possible injury, such as the chance of the *putindar* throwing up the land and its being diminished in value by what has been taken by Government, and still remaining, as it did, liable to pay the same revenue, is not appreciable and cannot be taken into account. If there is no abatement of the rent and the *putindar* continues liable to pay to the zemindar the same rent as he had to pay before, there would be nothing for which the zemindar is to receive compensation. The same rule applies to the case of a lease in perpetuity with fixity of rent (a).

The burden of proof is on the zemindar to make out his claim and show as to the value of a particular contingency to him (b). **Satis Chunder Chattopadhyaya v. Rai Jatindra Nath Chowdury**, 7 C.L.J. 284.

HILL & BRETT, JJ.

References:—(a) 20 W.R. 370, *followed*. 7 C. 585, *commented on*; (b) 28 C. 146, *followed*.

(2) Plaintiff suing defendants for recovery of land of which their father and they themselves recorded as proprietors in 1868 and 1892—In 1868 plaintiffs' fathers recorded as minors—Defendant entered as in possession on their behalf—No adverse possession—Defendant must be taken to have fully compensated himself having been in possession—Defendant not entitled to it—See **ABANDONMENT**, No. 1, 97 P.W.R. 1908.

(3)—See ACT I of 1894 (LAND ACQUISITION).
Compromise.

(1) *Judgment—Time for its dating and signing—Parties can compromise both before and after judgment is delivered—Civ. Pro. Code, (Act XIV of 1882), Ss. 19, 202 and 375—Act VIII of 1890, S. 40.*

Held, that when a Judge signs and dates a judgment, and the parties lawfully compromise the case, and the compromise has been brought to his notice before he actually delivers the judgment to the parties in open Court, the Judge has no power to decline to after it, but is rather bound to decide it in accordance with the terms of the compromise.

Compromise—(Continued).

Held, also, that it is illegal to sign and date a judgment before it is actually delivered in the presence of the parties in open Court.

Held further, that even after a complete legal judgment there is no prohibition for the parties to come to any lawful terms they wish in respect of the subject-matter in dispute. A guardian appointed under Act VIII of 1890 can at any time, withdraw from the guardianship and, if he does so, the Court should proceed to act under S. 40 of the Act and discharge him **Guranditta Mal v. Radha Kishen**, 67 P.W.R. 1907.

JOHNSTONE, J.

(2) *Compromise decree made in a suit for money—Minor—Court, sanction of—Decree directing immovable properties hypothecated to be sold for realization of the money—Suit for realization of balance by sale of properties mentioned in decree—Decree directing lien on immovable property, is void—Registered instruments, if necessary—Registration Act (III of 1877), S. 17—Transfer of Property Act (IV of 1882), Ss. 58, 59 and 100—Mortgage and charge, difference between the two—Civ. Pro. Code (XIV of 1882), S. 375—Suit nature and scope of.*

The provisions of S. 17 of the Registration Act (III of 1877) do not apply to proper judicial proceedings whether consisting of pleadings filed by the parties or of orders made by Court when registration would be otherwise necessary.

The question whether any particular term of a petition of compromise incorporated in a decree, made under the power given by S. 375 of the Civ. Pro. Code, relates to the suit or is covered by its subject-matter must be decided from the frame of the suit, the relief claimed, and the relief allowed by the decree on adjustment by lawful agreement. The mutual connection of the different parts of the relief granted by a consent decree is an important element for consideration in each case in deciding whether any portion of the relief is within the scope of the suit. No hard and fast rule can be laid down, each case being governed by its own facts.

A decree passed on a compromise cannot be regarded as *ultra vires* simply because it goes beyond the subject-matter of the suit and contains other conditions; if these other conditions are the considerations for the compromise of the subject-matter of the suit, they must be incorporated in the decree (b).

Compromise—(Continued).

The Transfer of Property Act contemplates a difference between mortgages and charges, though, no doubt, the mode of granting relief and the nature of the relief that may be granted are similar, because a decree for sale is the only relief that may be granted for the enforcement of a charge.

A mortgage is a transfer of an interest in specific immovable property; a charge only secures payment of money out of that property. Either may be created by act of parties, but when the "transaction does not amount to a mortgage," and does not therefore operate as a transfer, it is a charge on immovable property. A document which only gives a right to payment out of a particular property without transferring it, creates a charge.

If an instrument is expressly stated to be a mortgage and gives the power of realization of the mortgage-money by sale of the mortgaged premises, it should be held to be a mortgage. The fact that the necessary formalities of due execution were wanting would not convert the mortgage into a charge. If, on the other hand, the instrument is not, on the face of it a mortgage, but simply creates a lien, or directs the realization of money from a particular property, without reference to sale, it creates a charge (*d*). **Gobinda Chandra Paul v. Dwarka Nath Paul**, 7 C.L.J. 492 = 12 C.W.N. 849 = 35 C. 837.

MITRA and CASPERSZ, JJ.

References.—(a) 25 I.A. 9, 26 I.A. 101, *P*; 28 A. 78, 29 M. 365, 2 C.W.N. 663, *R*; (b) 26 I.A. 101, 28 A. 78, 34 C. 456, 2 C.W.N. 663, 5 C.W.N. 465, *R*; 1 C.L.J. 388, 5 C.L.J. 611, *D*; 25 M. 553 *Expt.* (c) 23 Q.B.D. 239, 12 Q.B.D. 247, *R*; (d) 23 Q.B.D. 239, *R*.

(2 a)—by Hindu widow in a suit followed by decree—Effect on reversioners.—See **HINDU LAW (WIDOW)**, No. 5, 5 A.L.J. 43.

(3) Suit against joint tort-feasors—Compromise between plaintiff and one defendant—Such compromise no bar to a decree against the other defendants.—See **TORT**, No. 3, A.W.N. (1908), 190.

(4) Unlawful, by trustee—Effect. See **HINDU TEMPLE**, No. 1, 12 C.W.N. 946.

(5) Certified guardian compromising suit—Sanction of Court if necessary.—Court's duty in sanctioning compromise under S. 462, Civ. Pro. Code. See **CIV. PRO. CODE**, No. 259 8 C. L. J. 266.

(6) In order that a compromise may be binding upon a minor the leave of the Court must

Compromise—(Concluded).

be express—Must be arrived at after exercise of judicial discretion as to the propriety of the compromise—Presumption—Compromise decree when to be set aside. See **PRIMOGENITURE**, No. 1, 8 C.L.J. 274.

(6-a) No order expressly stating that Court considered the compromise and was satisfied it was for minors' benefit—Presumption to be made, till contrary shown, that Court considered it and was satisfied. See **CIV. PRO. CODE**, No. 253, 8 C. L. J. 31.

(7) Suit for sale on a mortgage—Compromise by which mortgagee accepted a simple money decree—second suit for sale barred.—See **CIV. PRO. CODE**, No. 20, A. W. N. (1908), 265.

(8) When compromise, entered into by party on supposition of doubtful right can be set aside. See **TRANSFER OF PROPERTY ACT**, No. 4, 18 M. J. J. 469.

(9) Compromise decree not in accordance with the relief claimed in the plaint—Appeal—Procedure. See **CIV. PRO. CODE**, No. 236, 77 I. R. 1908.

Compromise petition—constituting a lease and filed in a criminal proceeding—Registration necessary to be admissible in evidence.—See **REGISTRATION**, No. 1, 12 C. W. N. 854.

Conditional Decree.

An order refusing to make absolute a conditional decree for foreclosure, is a—See (**MORTGAGE, FORECLOSURE**) No. 1, 4 N.L.R. 54.

Confession of judgment.

—, What amounts to. See **RES JUDICATA**, No. 7, 116 P.W.R. 1908.

Conflict of Decisions.

(1) —among the High or Chief Courts—Duty of Subordinate Courts.

A subordinate Court in the Punjab is bound in all cases to follow the rulings of the Chief Court, irrespectively of any conflict of authority that there may be between those rulings and the decisions of other High Courts, and of any views which the subordinate Court may itself entertain as to the equities of the case with which it is dealing. **Kasu v. Atar Singh**, 108 P.R. 1908 (F.B.)—142 P.W.R. 1908.

CLARK, C.J., and CHATTERJI and RATTIGAN, JJ.

Consent decree.

Rival claimants, with equal rights of pre-emption—Second claimant suing the first subsequently to first claimant, without impleading

Consent Decree.—(Concluded)

first claimant—Subsequent claimant obtaining consent during pendency of first claimant's suit for pre-emption—Effect of such consent decree—See PRE-EMPTION, No. 20, 20 P.R. 1908.

Consideration.

(1) Mere non-passing of consideration whether a sufficient test of benami transactions. See BENAMI TRANSACTIONS, No. 3, 12 C.W.N. 409.

(2) Promise made in writing signed by person to be charge therewith to pay a barred debt is a good consideration—But promise must be distinct and not a mere acknowledgement—S. 25 (3), Contract Act—See LIMITATION ACT, No. 21, 5 A.L.J. 274.

(3)—for transfer of property—Part being for valuable, and part intended to defeat or delay other creditors—whether whole transfer void—See TRANSFER OF PROPERTY ACT, No. 14, 7 C. L. J. 586.

(4)—Part of a single—for one object unlawful—whole agreement void under S. 24, Contract Act—See CONTRACT ACT, No. 11, 10 Bom. L.R. 553.

Suit on *hundi*—Consideration proved different from that stated in *hundi*—See CONTRACT ACT, No. 20, 3 M.L.T. 405.

(6) A copy of Koran is a valid consideration for *hiba bil euaz*. See MOHAMEDAN LAW (DOWER), No. 3, 13 C.W.N. 160.

Construction.

Canon of construing special texts in Hindu Law—See HINDU LAW (INHERITANCE), No. 2, 10 Bom. L.R. 149.

- (1) (OF ACTS).
- (2) (OF DECREES).
- (3) (OF DEEDS).
- (4) (OF WILLS).
- (5) (OF WORDS).

—1—(of Acts.)

(1) Statutes interfering with private rights, construction of—See TENANCY ACT (CENTRAL PROVINCES), No. 2, 4 N.L.R. 45.

(2) Statutes imposing restrictions upon the subject's right of suit to be construed strictly.—See CIV. PRO. CODE, No. 290, 1 Sind. L.R. 135.

(3)—construction of statutes by reference to repealed Statutes, when permissible—Statute 24 & 25 Vict., C. 105, referred to as throwing light on 28 & 29 Vict., C. 15. See JURISDICTION (OF HIGH COURT), No. 1, 12 C.W.N. 657.

(4) Rules framed by Municipality—Construction of rules—See MUNICIPALITY, No. 1, 10 Bom. L.R. 622.

Construction.—(Continued).**—1—(of Acts)—(Concluded).**

(5) Rights in a case to be determined by reference to Legislature's words—Those words should be used for the purpose of the issues. See CIV. PRO. CODE, No. 337, 6 Bom. L.R. 731=32 B 356.

(6) In matters of procedure, amending Acts affect legal proceedings commenced under repealed provisions. See ACT VIII OF 1885 (BENGAL TENANCY), No. 23, 12 C. W. N. 987.

(7) Extension of principles underlying the existing law to new phases of affairs by analogy and other methods—See CRIM. PRO. CODE, No. 19, P. W. R. 1908.

(8) A remedial measure must be liberally construed so as to advance the remedy—See ACT II OF 1906 (MAMLATDAR'S COURTS ACT), No. 1, 9 Bom. L.R. 1179=32 B. 46.

(9) Expression "whether that right has accrued before or after its commencement" in S. 2 (3) of Punjab Pre-emption Act, 1905, includes right created by Act itself—See ACT II OF 1905 (PRE-EMPTION), No. 5, 22 P.R. 1908.

Whether benefit of the 4th exception to S 37 of Act XI of 1859 can be extended to cover lands, included in lease, whereon buildings and tanks, etc., have not been constructed—exception limited only to land covered by buildings, tanks, etc.—See ACT XI OF 1859 (REVENUE SALE LAW), No. 5, 12 C.W.N. 1029.

—2—(of Decrees).

(1) Decretal amount directed to be paid by defendant from future wages—Intention of parties to be considered.

Where the defendant is directed by the decree to pay future wages at a certain rate "till date of payment," the decree is not declaratory, but one capable of execution (a).

In deciding the question whether a decree is declaratory or capable of execution, the intention of the parties must be taken into consideration (b) *Thamarasseri Rama Nambiasan v. Neelakandan Nambudri*, 4 M.L.T. 330.

SANKARAN NAIR and ABDUR RAHIM, JJ.

References:—(a) 7 M. 80, 12 M. 183 and L.P.A. 13 of 1906, R. (b) L.P.A. 13 of 1906, F.

(2) Appeal dismissed on accepted "with costs"—Meaning of.

Where the words of a decree are open to doubt that construction must be placed on the words used, which does not impose a liability

Construction—(Continued).**—2—(of Decrees)—(Concluded).**

on the judgment debtor, which is not in express and specific terms imposed upon him. If, therefore, an appeal is dismissed or accepted "with costs," *simpliciter*, the proper interpretation of the words "with costs" is that the costs of the appellate Court alone are awarded, and not the costs of the lower Court, **Bakshi Ram v. Gumanoo**, 18 P.R. 1907 = 50 P.L.R. 1907 = 102 P.W.R. 1907, Sup. No. 1.

CHATTERJI and RATTIGAN, JJ.

References:—45 P.R. 1877, F, 19 W.R. 152, D.

(3) Power of executing Court to refer to judgment and other documents to interpret decree—See DECREE, No. 4, 60 P.W.R. 1908.

(4) Decree imposing a condition—Construction—See LIMITATION ACT, No. 132, 17 M.L.J. 566.

—3—(of Deeds).

(1) *Maintenance deed, construction of—*
"Putra Prudradi santan," meaning of—
Intention.

In construing a deed, the question is, not what the parties to a deed may have intended to do by entering into the deed, but what is the meaning of the words used in that deed. (a).

The words "*Putra Pautradri santan*" (sons, grandsons and the like issue) have a definite and well-ascertained meaning and mean all the heirs, male and female, though the two heirs expressly mentioned are the first two of the male heirs (b).

The word "*santan*" means issue both male and female (c).

In a deed of maintenance, the grantor used the following words. "Upon your death, your sons, grandsons and the like issue, that is, your male successors in the descending line shall continue to get the same."

Held, that the words "your male successors in the descending line" are not explanatory, but are used in a restrictive sense to exclude female heirs.

Held, on a construction of the deed, that, upon the death of the wife leaving a daughter, no right to the maintenance allowance accrued to the husband. **Kishori Mohan Sanyal v. Shilb Chandra Lahiri**, 7 C.L.J. 291.

STEPHEN and MOOKERJEE, JJ.

References:—(a) 9 H.L.C. 114 (146), F, 8 C.L.J. 224 (234), 5 C.L.J. 208 (215) = 34 C. 358

Construction—(Continued).**—3—(of Deeds)—(Continued).**

(367), R; (b) 8 I.A. 46 (62) = 7 C. 304 (315), 5 I.A. 138 (147) = 4 C. 23 (27) 2 C.L.R. 339 (343); 24 I.A. 76 (88) = 24 C. 834 (849), R; (c) 7 W.R. 320, 24 W.R. 268, R.

(2) *Deeds executed in the mofussil—Liberal construction—Charge—Intention to make land security for payment of debt—Transfer of Property Act (IV of 1882), S. 100.*

Documents executed in the mofussil come within the statement of the Privy Council in 6 M.I.A. 411 that "deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses."

Where having regard to all the circumstances of a transaction, there remains no doubt that a document is sufficient and does show an intention to make the land security for the payment of the money mentioned therein, the document deed create a charge. **Janardana Vishnu v. Anant Laxmanshet**, 10 Bom. L.R. 575 = 32 B. 386.

JENKINS, C.J. and BATCHELOR, J.

Reference:—6 M.I.A. 411, R.

(3) *Grant—Construction of—Forfeiture—Right of re-entry.*

T granted a *miras taluq* to his widowed daughter at a rent, for her life, and on her death to her adopted son, if she adopted one, for life, and after him to his sons, grandsons, &c., by right of inheritance, in the male line but without any power of alienating the property. In case the grantee adopted no son or her adopted son died without any heir in the male line, the property was to revert to the grantor or his representative. It was also provided that the property could not be attached or sold for any debt incurred by the grantee or her adopted son, grandson, &c. In case of attachment or sale, it would be void and the property would come into the *khas* possession of the grantor or his representative.

Held, the grant did not create an absolute estate in the daughter. At the same time the grantor had no right to re-enter in case of a voluntary alienation. That right was limited to cases of attachment or sale.

When therefore the grantee made a gift of the property to her adopted son, **held**, the gift was void, but the grantor or his representative

Construction—(Continued).**—3—(of Deeds)—(Continued).**

could not obtain *khas* possession of the property. **Dharani Kanta Lahiri Chaudhuri v. Shiba Sundari Debysa**, 8 C.L.J. 188.

STEPHENS AND HOLMWOD, JJ.

- (4) *Government Kist—Enhancement—Whether mortgagor or mortgagee bound to pay—S. 76, Transfer of Property Act—“Contract to the contrary”.*

Where the question was whether the amount of enhancement in the Government kist was to be paid by the mortgagor or the mortgagee and turned on the construction of the *kanom* or mortgage deed, which contained these terms: —“In consideration of an advance of Rs. 79, 580, the mortgagee is to hold possession for 12 years, of land yielding a *pattam* of 80 paras of paddy and Rs. 40 and is to pay a *pura pad* of 12 paras of paddy and 12 fanams and 50 cocoanut leaves having deducted interest and Government revenue:”

Held, that there was nothing in the deed to throw on the mortgagor the burden of providing the enhancement in the Government revenue, there being no contract to the contrary within the meaning of S. 76 of the Transfer of Property Act, and that the law required the mortgagee to bear the burden if he was not relieved of it by his contract. **M. Tuppan Nambudri v. Y. P. Chinna Pari Kutti**, 18 M. L. J. 31.

MILLER & MUNRO, JJ.

Reference: —14 M. L. J. 488, referred to by the Editor.

(5) Deed of gift limiting rights of donee—Condition that donee should keep property for life—Declaration that donor or his heirs to have no claim to property given—Absolute ownership conferred on donee—See CUSTOMS (PUNJAB), inheritance and succession No. 2, 72 P.W.R. 1908.

(6) Deed of *wakf*, construction of. See MAHOMEDAN LAW (WAKF), No. 1, 11 O.C. 48.

(7)—construction of grants—Secondary evidence—See EVIDENCE ACT, No. 6, 7 C.L.J. 90.

(8) Provision to make over land on failure to redeem mortgage at a certain time—Effect—Construction of the provision—See MORTGAGE (REDEMPTION), No. 6, U.B.R. (1907), 3rd Quarter, Mortgage, 1,

(9) Mortgage of revenue paying land with possession—Mortgagee to receive *malikana* by

Construction—(Continued).**—3—(of Deeds)—(Concluded).**

way of interest and a certain rate within a fixed time, or to get actual possession, in case of default—Relationship of landlord and tenant not thus created. See JURISDICTION (OF CIVIL AND REVENUE COURTS), No. 9, 17 P.W.R. 1908.

(10)—See WAJIBULARZ.

(11)—See PRE-EMPTION.

(12) Construction of compromise of previous suit—Effect of compromise—Hindu Law—Impartable estate—See HINDU LAW (IMPARTIBLE ESTATES), No. 1, 5 A.L.J. 425.

(13) Absolute sale or gift in favour of temple—Power to appoint manager of land—Deed in donor's custody—Effect—Construction of deed—Subsequent conduct of parties. See RELIGIOUS ENDOWMENTS, No. 6, 18 M.L.J. 304.

(14) Construction of mortgage-deed—Suit for redemption—Possession on default of payment of interest, stipulation for—Interest. See MORTGAGE (REDEMPTION), No. 22, 11 O.C. 323.

(15) Testator bequeathing ‘money’ to legatees—Intention of testator—Term need not be strictly construed. See WILL, No. 8, A.W.N. (1908), 205.

(16) Mortgage—Construction—Unconditional promise to pay, if implies personal liability—See TRANSFER OF PROPERTY ACT, No. 61 a, 13 C.W.N. 198.

(17) Effect of words ‘as if due date has elapsed’ in a mortgage deed—See TRANSFER OF PROPERTY ACT, No. 44, 10 Bom. L.R. 203,

—4—(of Wills)

(1) Bequest to widow for life with power of alienation—Gift over. See HINDU LAW (WILL), No. 1, 12 C.W.N. 412.

(2) See WILL, No. 5, 10 Bom. L. R. 97.

(3) Construction of Hindu wills—Ordinary notions and wishes of Hindus with respect to devolution of property may be considered—See HINDU LAW (WILLS), No. 2, 12 C.W.N. 729.

(4) Effect of word ‘Malik’ in will—Effect may be modified by context—In construing will, Court, must look, and give effect, to all its clauses. See HINDU LAW (WILL), No. 4, 8 C. L. J. 20.

(5) Hindu will—Intention of testator, how far guide in construction—Absolute estate—See HINDU LAW (WILLS), No. 3, 1 Sind L.R. 211.

Construction—(Continued.)**—4—(of Wills)—(Concluded.)**

Last male owner's will making daughter's son *karta*.—Construction. See HINDU LAW (WILL), No. 6, 4 M.L.T. 9.

(7) Gift to daughter-in-law for sustenance, etc.—See HINDU LAW (WILLS), No. 7, 4 M.L.T. 198.

(8) Construction of term "malik" used in will to be made with reference to its context and other circumstances. See HINDU LAW (INHERITANCE), No. 5 8 C.L.J. 369.

(9) *Persona designata*—Reason and motive of gift—Adopted son—Description. See WILL, No. 10, 5 A.L.J. 626.

(10) See ACT XXI of 1870 (HINDU WILLS). No. 1, 4 M.L.T. 306.

—5—(of Words.)

(1) "Vagaira"—Meaning of—Palmyrah etc., if include mango trees.

A clause in a *patah* runs thus:—"you have no connection whatever with the palmyrahs, dates, babul and other (Vagaira) trees standing on the said lands".

Held that it may be reasonably doubted whether fruit trees like mango trees can be properly said to fall within this clause. The term "vagaira" should be understood to indicate other trees of the same class as those previously specified and these are not generally looked upon as fruit trees. **Gutta Venkatasubanna v. Govinda Krishna Yachandru Yaru Bahadu**, 4 M.L.T. 498.

MUNRO and PINNEY, JJ.

(2)—"Judge of the Court of Small Causes" in Sch. II, cl. 8 of Act IX of 1887 (Provincial Small Cause Courts), construction of—See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), No. 5, 7 C.L.J. 407.

(2-a) "Special contract," meaning of. See ACT XXI of 1886 (RENT), No. 2, 11 O.C. 75.

(3) "Land"—Land at one time agricultural and assessed with revenue of 9 pies—Purchase by vendee after it had been built over—whether can be considered as "land" conferring right of pre-emption on vendee—See ACT IV of 1872 (PUNJAB LAWS), No. 2, 109 P.L.R. 1908.

(4) "May," meaning of—Whether vests the Court with discretion which it can uniformly exercise in one case and reounce in the other—See INSOLVENCY ACT (11 & 12 Vic. C. 21), No. 6, 10 Bom. L.R. 345.

Construction—(Continued.)**—5—(of Words)—(Continued)**

(5) Construction of word "may" in S. 140 of Indian Railways Act—means "must"—See ACT IX OF 1890 (RAILWAYS), No. 5, 12 C.W.N. 450.

(6) Suit for "money" includes suit which results in a decree for money—See CIV. PRO. CODE, No. 299, 10 Bom. L.R. 837.

(6-a) Meaning of "money", "cash"—Construction of will—See WILL, No. 11, 5 A.L.J. 708, and No. 8, A.W.N. (1908), 205.

(7) "Revenue" and "proprietor" meaning of—Act VII of 1868 (Bengal Code)—See LANDLORD and TENANT, No. 15, 7 C.L.J. 460.

(8) Due date of draft—Meaning—See LIMITATION, No. 8, 54 P.W.R. 1908.

(9) "Such plaintiff" in S. 380 para. 2, C. P.C., construction of—See CIV. PRO. CODE, No. 240, 18 M.L.J. 155.

(10) "Plaintiff" means every person asking relief against another person—See PRACTICE, No. 5, 10 Bom. L.R. 327.

(11) "Preliminary point," meaning of—See CIV. PRO. CODE, 313, 2 P.R. 1908.

(12) Meaning of "Mokurari"—See ACT VII OF 1885 (BENGAL TENANCY), No. 4, 12 C.W.N. 175.

(13) Meaning of "malik" in wills—See HINDU LAW (WIDOW), No. 4, 12 C.W.N. 281.

(14) *Resa milkiat*—Meaning of—*Wajib ul arz*—See *RESA MILKIAT*, No. 1, 11 O.C. 164.

(15) "*Digar daveda*." See VENDOR and VENDEE, No. 3, 111 P.R. 1908.

(15-a) Tribe, meaning of—S. II, Punjab Pre-emption Act (1905). See ACT II OF 1905 (PUNJAB PRE-EMPTION), No. 6, 112 P.R. 1908.

(16)—"debts and liabilities" in S. 8. (c), Chota Nagpore Encumbered Estates Act. See ACT VI OF 1871 (CHOTA NAGPORE ENCUMBERED ESTATES), No. 1, 7 C.L.J. 578.

(17) Term *Khanadamad* explained. See CUSTOMS (PUNJAB) (ALIENATION), No. 13, 70 P. R. 1908.

(18) Term "*Shikmi Sharik*" explained. See PARTNERSHIP, No. 6, 75 P.R. 1908.

(19) "Definite share in" first part of cl. (a), sub S. (v), S. 7 of the Court Fees Act does not mean definite share separately assessed with revenue. See COURT FEES ACT, No. 10, 12 C.W.N. 990.

Construction—(Concluded).

—5.—(Of Words).—(Concluded).

(20) The word "appear" in S. 354 of Act III of 1898 (City of Bombay Municipality) does not involve "appears to the eye"—Meaning. See ACT III OF 1888 (CITY OF BOMBAY MUNICIPALITY), No. 1, 10 Bom. L.R. 821.

(21) The words "or otherwise" in S. 22 of the Bengal Tenancy Act, must be construed, "*Ejusdem generis*" and do not include the case of ~~an~~ holding reverting to the landlord on the failure of the tenant's heirs. See ACT VIII OF 1885 (TENANCY, BENGAL), No. 6, 8 C.L.J. 324.

(22) Meaning of the term "foreclosure" in the Punjab. See MORTGAGE (REDEMPTION), No. 21, 137 P.W.R. 1908.

Contempt of Court.

(1) *Language which strikes at the root of all respect for the Court and its authority amounts to contempt—Criticism of Judge or Court how far justifiable.*

Any act done or writing published, calculated to bring a Court or a Judge of the Court to contempt, or to lower his authority, or to obstruct or interfere with the due course of justice or the lawful process of the Court, is a contempt of Court.

Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, it is not a contempt of Court. *In re, Narsinha G. Kelkar*, 10 Bom. L.R. 1040.

SCOTT, C.J., AND BATCHELOR, J.

Reference:—2 Q.B. 39, F.

Contingent interest.

—which adopted son takes by will which provided that, on death of widow, he should take property, provided he was obedient and well-behaved towards widow—Condition, whether void for uncertainty—whether it is alienable. See HINDU LAW (ADOPTION), No. 1, 12 C.W.N. 668.

Contract.

(1) *Immoral contract—Right to sue.*

Where the plaintiff cannot make out his case except through an immoral transaction to which he was a party, he must fail. *Muncharam Pitamber v. Regina Stranger*, 10 Bom. L.R. 318.

RUSSEL, J.

Contract—(Continued).

(2) *Mahabrahmani offerings, contract with respect to—Representatives of parties to the agreement, effect on—Immoveable property—Transfer of non-existent property.*

Held, that a contract amongst Mahabrahmans with respect to the distribution of alms to be received in the future by the exercise of voluntary charity is not enforceable against the heirs or representatives of the parties to the agreement.

Held, further that, if the transaction were regarded as a transfer rather than a contract, it could not take effect with respect to non-existent property (a) *Baddu v. Babu Lal*, 11 O.C. 212 (B).

EVANS AND GREEVEN, J.C.S.

References:—(a) 5 O. C. 225; S. C. A. No. 216 of 1886, S. C. A. No. 486 of 1898, J. P.'s S. C., App. 1, S. 622 Appn, No. 53/38 of 1895; S. C. A. No. 309/183 of 1900, S. C. A. No. 213 of 1901 and S. C. A. No. 243 of 1903, R.

(3) *Place of payment—Debtor to follow his creditor, when—Principal and agent—Civ. Pro. Code; S. 17.*

Held, that, where no place of payment is specified either expressly or by implication, the debtor must follow his creditor and pay where his creditor is.

Held, further, that the same rule applies to the case of an agent who has to pay money to his principal (a) *Suraj Kumar v. Gokul Chand*, 11 O.C. 191

CHAMBER, J.C.

References:—(a) 20 Q. B. D. 152; 1 Q. B. 753; L. R. (1893) Probate, 119; L. R. (1898) A. C. 524; 2 K.B. 685, R.; 27 M. 355, D.

(4)—*to assign pattas—Legality of, of insurance—Specific performance.*

On a promise to effect an insurance and assign the pattas to the defendant on his paying a certain amount to the plaintiff, *held*, that there is nothing illegal in the contract to assign the pattas, and that, even if the original contract of insurance is illegal, it is not open to the defendant to set it up, as the plaintiff effected the insurance and paid the amounts as they fell due, on the defendant's promise to take an assignment after a certain period. *Narigiri Veerasalingam v. Seethapathy Sathiragoo*, 3 M.L.T. 393.

SANKARAN NAIR, J.

Contract.—(Con

(5) *Contract, opposed to morality and public policy, if money advanced applied for immoral purposes.*

If money was advanced by the creditor to the debtor to be applied for an immoral purpose, the contract would be opposed to morality and public policy. A suit to recover money advanced in pursuance of such a contract will not lie. **Pannichand v. T. Nanoo Sanker Tawker**, 4 M.L.T. 107=18 M.L.J. 456.

WALLIS, J.

Reference:—3, Barnewall and Alderson, 179, F.

(6) *Cross contracts—Suit for recovering difference on the cross contracts—Breach—Readiness and willingness to take or give delivery.*

Where cross contracts were entered into between plaintiff and defendant, for the same quantity of goods deliverable between the same dates, held, that plaintiff was entitled to recover the amount of the difference on the two sets of contracts, without proving his readiness and willingness to give or take delivery of the goods. Neither party, could, under the circumstances, have intended to require actual delivery. **Thakursi Hansraj v. Tejanmal**, 1 S.L.R. 248.

LUCAS, J.C., AND PRATT, A.J.C.

(7) *Sale of house—Sale of encumbered property—Failure to clear encumbrance—Claim for rent—Retention of purchase money* See **SALE**, No. 2-a, 4 L.B.R. 224.

(8) *Instrument evidencing loan of paddy and providing for its return on certain date, whether bond—Limitation.* See **LIMITATION REGULATION (TRAVANCOR)**, No. 1, 23 T.L.R. 48.

(9) *Contract to lend money, specific performance of—Maintainability of suit—Contract whether creates debt.* See **SPECIFIC PERFORMANCE**, No. 2, 11 O.C. 217.

(10)—terms of, question as to whom the parties to a contract are, whether question as to. See **EVIDENCE ACT**, No. 19, 18 M.L.J. 1.

(11)—with a company—Memorandum and Articles of Association—Commission Contract—Contract with promoters. See **COMPANY**, No. 1, 10 Bom. L.R. 141.

(12)—Validity of—by person subsequently declared to be owner of encumbered estate—Competency to contract—Subsequent withdrawal of encumbrance—Revival of validity—

Contract.—(Concluded).

Barring of pending suits—"Debts and liabilities," meaning of. See **ACT VI OF 1870 (CHOTA NAGPORE ENCUMBERED ESTATES)**, No. 1, 7 C.L.J. 578.

(13) *Termination of—Revival—Incorporation of its terms in new one.* See **REG. VIII OF 1819 (PUTNI)**, No. 3, 7 C.L.J. 604.

(14)—forbidden by law, suit on, not maintainable. See **ACT XX OF 1882 (PAPER CURRENCY)**, No 1, 14 Bur. L.R. 120.

(15) *Proposal by Municipality to acquire land—Acceptance of proposal—Completed contract—Difference as to price—Court's power to fix price.* See **ACT III OF 1901 (DISTRICT MUNICIPALITY)**, No. 2, 10 Bom. L.R. 617.

(16) *Separate suits in respect of separate breaches of the same contract, whether maintainable.* See **CIV. PRO. CODE**, No. 62, A.W.N (1908), 199.

(17)—of hiring providing for payment of certain wages—Discontinuance of business—Master liable to pay the wages agreed upon, whether he had work for the servant or not—Action for damages. See **MASTER AND SERVANT**, No. 1, U.B.R. (1908), 2nd Quarter, Master and Servant, p. 1

(18) *Transfer of Property Act, S. 65—Mortgagee knowing all circumstances of mortgage—Implication of contract.* See **TRANSFER OF PROPERTY ACT**, No. 33, 4 M.L.T. 437.

(19) *Liability of ship owner who carries goods for hire in his ship—Law on the subject, how affected by the—* See **CARRIERS**, No. 2-a, 14 Bur. L.R. 77.

Contract Act.

(1) **Ss. 2 (c), 37, 38 and 67—Payment of interest under contract—Creditor dying leaving will but without executors—Stopping of interest payable—At Common Law—Interest payable as damages—Meaning of "promise" in S. 38—No legal representative in existence—Tender under S. 37, to be proper, unconditional—Promisee in S. 67 includes person interested in the deceased creditor's estate—Under S 67, debtor entitled to reasonable facilities—Appointment of legal representative within reasonable time—Once on debtor to prove readiness—"Reasonable facilities" and "reasonable time" explained—Validity of notice by debtor or of readiness—Provisional appointment of administrator pendente lite—Civ. Pro.**

Contract Act.—(Continued).

Code, Ss. 272 and 470—Interpleader—Attachment of debt—Running of interest not stopped.

Where a debtor is ready to pay the debt due from him, but, owing to the death of the creditor and the absence of a legal representative, there is none to whom the payment can be made, the interest payable under the terms of the contract stops running until the appointment of a proper representative of the deceased creditor, to whom the payment can be made with safety, and who can give a proper discharge for the debt.

At Common Law, when interest is payable by the terms of the contract, it runs ordinarily up to date of payment or legal tender (a)

Where interest is payable, not under the terms of a contract, but by way of damages, the Courts will deprive the representative of a deceased creditor of interest, when he has omitted to take out administration and thereby prevented the debtor from paying (b).—*Obiter.*

When interest is payable under a contract up to the date of payment of the principal, payment of interest, being in performance of the contract, must be governed by the provisions of the Contract Act relating to the performance of contracts.

The word "promisee" in S. 3, Contract Act, includes the representative of a deceased promisee.

Where the promisee died, leaving a will but without naming executors, unless and until such executor is appointed, there can be no representative of the deceased to whom performance can be made.

When a debtor requires a representative of his deceased creditor to come and receive payment, and further makes the payment conditional on his producing a succession certificate, the tender so made is not proper, as it does not fulfil the conditions mentioned in S. 38 of the Contract Act (c).

By S. 2 (c) of the Contract Act, the word "promisee" means "the person accepting the proposal," only unless a contrary intention appears from the context; and so in S. 67 of the Act the word "promisee" must include a person interested in the estate of a creditor who has died leaving a will but without executors, as, otherwise, between the date of the death of

Contract Act.—(Continued).

the deceased and the appointment of a legal representative, there will be no promisee at all within the meaning of the section.

Under S. 67 of the Contract Act a debtor has to show that his non-performance (failure to pay) has been caused by the absence of reasonable facilities for paying, and to successfully do this, he has to prove that he had the money ready, and was only prevented from paying it by the absence of reasonable facilities.

Under S. 67 of the Act, a debtor to the estate of a deceased creditor is, like any other promisor, entitled to be afforded reasonable facilities for the performance of his contract; and he cannot be said to be afforded "reasonable facilities, if no one is provided, "within a reasonable time," to whom payment may be made with safety; and such "reasonable time" must be calculated from the time when the debtor intimates his desire to pay, rather than from the time of the death of the deceased creditor.

Where a debtor, not aware of the will left by his deceased creditor, gives notice of his readiness to pay to one who would, had there been no will, have succeeded to the estate of the deceased, such notice is sufficient and proper

In case of any litigation regarding will propounded, facilities can be afforded by getting appointed an administrator *pendente lite*, who could give a discharge to the debtor.

A debtor is not bound to file an interpleader suit under S. 470, C.P.C., for stopping the running of interest.

An attachment of a debt, made under S. 272, C.P.C., does not stop interest running thereon. **Administrator-General of Madras v. Jaghirdhar of Arni**, 4 M.L.T. 335.

WALLIS, J.

References—(a) 42 Ch. D. 610; 1 Eq. Ca. Ab. 319; 2 Eq. Ca. Ab. 643, R.; (b) 15 Ch. D. 169, R. (c) 28 C. 557; 1 M.H.C. 124; 16 B. 141 (150) and 26 B. 643, R.

(2) *S. 11—Contract by a minor—Indian Evidence Act, S. 115—Estoppel against a minor—False and fraudulent misrepresentation by a minor—Principle of liability—Test applicable to such cases.*

Per Banerji, J.—When a plaintiff made false and fraudulent representations as to his age with a view to induce the defendant at first to

Contract Act.—(Continued).

lend him and afterwards to purchase his property, *held*, that, in a suit to recover the property upon the ground that the contract was by reason of his minority void, the plaintiff was liable in equity to make restitution of the benefit he had obtained (a). In a case like this the liability attaches to a minor, not on the ground of estoppel, but on the ground that an infant shall not take advantage of his own fraud (b).

Per Richards, J. :—Even assuming that an infant is liable for fraudulent misrepresentation in an action for deceit, and that the fraud of an infant may be set up as a defence when the infant seeks to set aside a transaction induced by his fraud, a fair test, in a case when the infant sues to recover property sold by him, for awarding restitution of the money to the vendee, is to consider whether the defendant vendee on the evidence could succeed if he were suing as plaintiff in a suit for damages for fraudulent misrepresentation. The vendee in the present case, not having proved that they were induced to enter into the contract of sale by the fraudulent misrepresentation of the minor plaintiff, were not entitled to restitution of money (c).

Obiter :—*Per Banerji, J.* :—“ I do not deem it necessary to express any opinion on the point, although it seems to me to be difficult to hold that in no case would the doctrine of estoppel be applicable to infants.”

Per Richards, J. :—“ In my opinion the ordinary law as to estoppel does not apply to infants.” **Jagar Nath Singh v. Lalta Prasad**, 5 A.L.J. 674=A.W.N. (1908), 267.

BANERJI AND RICHARDS, JJ.

References :—(a) 30 C. 539, D. (b) 16 L. J. Ch. 205, F. (c) 30 C 539, (1902) Ch. 1 and (1903) A.C. 6, R.

(3) Ss. 12, 30—Contract by lunatic—Lunacy not known to the other contracting party—Power of Court to grant equitable relief—Specific Relief Act, Ss. 38, 41. See LUNACY, No. 1, 10 Bom. L.R. 1004.

(4) S. 16—Undue influence—Deed of mortgage executed while under arrest in execution of money decree in satisfaction of that decree—Punjab Courts Act, XVIII of 1884, S. 70 (1), (a) and (b).

Where the defendant executed a mortgage deed, the consideration for the deed being a previous money decree, and where it was found that the defendant was arrested and kept in

Contract Act.—(Continued).

custody and was released on or just before executing the deed, *held*, that the deed was not void on the ground of undue influence, merely because the deed was executed, while the defendant was under arrest in execution of the previous money decree (a).

An appeal is not competent in a suit for possession, but the case can be taken up by the Chief Court under S. 70 (1), (a) and (b) of the Punjab Courts Act (b). **Mul Chand v. Imam Bakhsh**, 51 P. R. 1908=101 P.W.R. 1908=160 P.L.R. 1908.

CHATTERJI, J.

References :—(a) 4 A. 352, D. and (b) 24 P. R. 1903 (F.B.), R.

(5) S. 16—Undue influence—Relations between parties which placed one in a subordinate position, essential—Contract Act, S. 16.

Held that, in order to make out a case for undue influence under S. 16 of the Indian Contract Act, 1872, there must be certain relations between the parties anterior to the transaction in question which placed one party in a position to dominate the will of the other (a). **Dwarka Singh v. Raghubir Prasad**, 11 O.C. 295

EVANS, J.J.C.

References :—(a) 8 C.L.R. 419; 22 B. 17; 25 B. 10; 36 P.R. 1901, 10 A 535, R.

(6) S. 16—Money-lender—Undue influence—Unconscionable bargain.

Where a professional money-lender sued a person in difficulties for money, on a pro-note, the consideration being a much smaller sum than that mentioned in the pro-note, it was *held* that, at the time of executing the note, the defendant was clearly under the plaintiff's thumb, and a hard, unconscionable and exorbitant bargain was driven with him taking advantage of his necessities, and that the plaintiff could recover only the sum actually advanced by him, but with a high rate of interest (e.g., 18 p.c.), as he ran considerable risk when he lent out the money. **Ram Das v. Netto**, 115 P.R. 1908.

CHATTERJI AND JOHNSTONE, JJ.

References :—11 A. 57; 11 A. 118; 11 A. 128; 15 Ch. D. 705; 11 Eq. 789.

Contract Act—(Continued).

(7) S. 16—Presumption made by section as to undue influence. See Civ. Pro. CODE, No. 1, 12 C.W.N. 1102.

(8) S. 16, cl. 1.—*Undue influence—Loan borrowed by a person in urgent need of money—Lender imposing terms on the loan—Promise to pay time-barred debt with interest—Unconscionable bargains—Fraud—Coercion.*

Under S. 16, cl. 1 of the Indian Contract Act, 1872, where two persons enter into a contract, *first* there must be subsisting between them some relation of the kind described in the clause; and, *secondly*, the dominating position arising out of that relation must have been used by the party holding that position to secure an *unfair* advantage over the other party.

When a man, who is in urgent need of money on account of his poverty and pecuniary difficulties, asks for a loan from another, the latter is in one sense in a position to dominate the will of the former by proposing his own terms and getting the borrower to agree to them. The borrower's necessity is in such cases the measure of the terms agreed to. That is a feature of every contract of money lending, where the borrower is a man without credit and the lender is exposing his money to considerable risk. But that is not the vague kind of relation and domination contemplated by the plain terms of cl. 1 of S. 16 of the Indian Contract Act, 1872.

There are well-known relations such as those of guardian and ward, father and son, patient and medical adviser, solicitor and client, trustee and *cestui que trust* and the like, which plainly fall within cl. 1 of S. 16 of the Indian Contract Act, 1872. Where no such specific relations exist and the parties are at arm's length, undue influence may be exerted but its existence must be proved by evidence; and in such cases, the nature of the benefit, or the age, capacity, or health, of the party on whom the undue influence is alleged to have been exerted are of great importance. In short, the test is, confidence reposed by one party and betrayed by the other, which means there must be an element of fraud or coercion, under either of which the acts constituting undue influence must range themselves.

The term "unfair advantage" in cl. 1 of S. 16 of the Indian Contract Act, 1872, is used as meaning an advantage obtained by *unrighteous* means.

Contract Act—(Continued).

A promise to pay a time-barred debt is valid. The same principle applies to a promise to pay such a debt with interest.

A Court of equity will not set aside a contract merely because it flows from moral, not legal, obligations, unless it is proved that the defendant was forced, tricked or misled into it by the plaintiff by means of fraud, using that word not merely in the restricted sense of actual deceit but in the larger sense of an unconscientious use of power arising out of certain circumstances and conditions and showing that the defendant being victimised by the plaintiff's unfair and improper conduct was unable to understand what he was doing. **Ganesh Narayan v. Vishnu Ramchandfa**, 9 Bom L.R. 1164 = 32 B. 37.

CHANDAVARKAR AND KNIGHT, JJ.

(9) S. 23—*Contract to pay a father in consideration of his giving his daughter in marriage—Public policy*

A contract to make a payment to a father, in consideration of his giving his daughter in marriage, is immoral and opposed to public policy within the meaning of this section (a). An inquiry in each case as to whether, having regard to the terms of the particular contract, the contract is or is not contrary to public policy, would be objectionable. A question of this sort should be decided on general principles. **Kalavagunta Venkata Kristnayya v. Kalavagunta Lakshmi Narayana**, 4 M.L.T. 1 (F.B.) = 18 M.L.J. 403.

WHITE, C.J., MILLER AND MUNRO, JJ.

References—(a) 13 M. 83, 17 M. 9; 22 B. 658, *Cons.*

(10) S. 23—*Contract—Agreement immoral or opposed to public policy—Lease of house to a prostitute.*

Held that knowingly letting a house to a prostitute with the object of her carrying on therein prostitution is immoral and contrary to public policy, and a landlord who knowingly so lets quarters to a prostitute to carry on prostitution cannot recover the rent in a Court of law. **Choga Lal v. Piyari**, A.W.N. (1908). 285.

STANLEY, C.J., AND BANERJI, J.

(11) Ss. 23 and 24—*Illegal contract—Contract to indemnify surety for his bail-bond—Crim. Pro. Code (Act V of 1898), S. 513—*

Contract Act—(Continued).

Whole consideration—One single consideration cannot be separated to validate an agreement.

Pending a criminal charge against L, his pleader stood bail for him; and as an indemnity for the bail took from him a sale deed and a rent note regarding his house, in the name of the plaintiff. The consideration for the sale deed was a sum of Rs. 8,000, of which Rs. 5,000 were the indemnity for the bail-bond and the remaining Rs. 3,000 represented the advances to be made thereafter by the plaintiff. The plaintiff sued on the rent note to recover from L the sum of Rs. 2,000 as rent.—

Held, that the contract for indemnifying the pleader for his bail bond was illegal and this illegality rendered the sale-deed void in law (a) that the rent note was tainted with the same illegality which affected the sale-deed and could not stand on any separate footing, that the agreement was an indivisible agreement, part of a single consideration for one object was unlawful, and, therefore, the whole agreement was void under S 24 of the Indian Contract Act, 1872.

Held, further that the deposit allowed under S. 513, Cr.P.C., is allowed in substitution only of the bond which the principal himself would otherwise execute, not in substitution of any bond which his surety executes. **Laxmanlal K Pandit v. Mulshankar Pitambardas**, 10 Bom. L.R. 553 = 32 B. 449.

BACHELOR AND HEATON, JJ.

Reference.—(a) 15 Q.B.D. 561, *F*.

(12) Ss. 23, 24 and 26 (*Act IX of 1872*)—*Agreement by a Hindu bridegroom not to marry again during the continuation of marriage with first wife—Practice—Relief.*

An agreement by a Hindu with the father of his first wife not to marry again during the continuance of his marriage with that wife is not *prima facie* void (a), either under S. 26, as an agreement in restraint of marriage, or under S. 23 or 24, as importing a consideration which is immoral or opposed to public policy.

The original relief claimed in a plaint must necessarily rest on facts which the plaintiff can verify as true. Facts which the plaintiff denied should not be included as a basis of claim.

Contract Act—(Continued).

No rule of pleading can be used to defeat justice, and each party is entitled to any part of the relief claimed by him which the facts asserted and proved by his adversary show to have been justly demanded. **Gama v. Lahario**, 4 N.L.R. 86

H.V. DRAKE-BROCKMAN, J.C.

Reference.—(a) L.R. (Ch. D.) (1875), 399.

(13) Ss. 23 and 43—Mortgage by disqualified proprietor—Consideration forbidden by law—Void—Suit after cessation of disqualification—Not maintainable. See ACT XVI OF 1882 (*JHANSI ENCUMBERED ESTATES*), No. 1, 4 A.L.T. 696 = 30 A. 38

(14) Ss. 23 and 151—Liability of carriers—Effect of conditions in bill of lading claiming exemption from liability—Contracting against liability—Whether opposed to public policy. See *CARRIERS*, No. 1 A.L.T. 110.

(15) S. 24—Contract with public servant—Conflict with public duties—Public Policy—Void contract—Expert agent, negligence of—Damages.

If a person enters into a contract with a public servant, which, he knows, casts upon the public servant duties which may conflict with the duties he owes to the public, such a contract is void.

A defendant with special skill, when employed for reward by the plaintiff, is bound to exercise his skill in the execution of the duties entrusted to him and ought not to rely on the statement of others. **The Sitarampur Coal Co., Ltd. v. T. H. Colley**, 13 C.W.N. 59.

FLETCHER, J.

(15-a) S. 24—See Nos. 11 and 12, *supra*.

(16) S. 25 (3)—Promise in writing to pay a barred debt, signed by person to be charged therewith, whether a good consideration under section—But a distinct promise and not a mere acknowledgment necessary. See *LIMITATION ACT*, No. 21, 5 A.L.J. 274

(17) S. 25 (3)—Suit on balance of account—Acknowledgment—Fresh promise to pay barred debt—Limitation. See *LIMITATION ACT*, No. 26, 102 P.R. 1908.

(17-a) S. 26—See No. 12, *supra*.

(18) S. 30—Badni transaction—Meaning of Badni contract—Principal and agent—Right of agent to recover payment actually made by him—Onus—Proof of agency.

Contract Act—(Continued).

Held, that monies paid on wagering or *Badni* Contracts are not recoverable, and, that an agent, before he can recover from his principal the amount claimed for losses in wagering contracts, entered into under the principal's instructions, must prove either actual payment on his principal's behalf, or that a liability has been incurred which is enforceable by law, and that a surrender of claim to profits made under a *Badni* Contract does not constitute an actual payment.

Held also, that an agent is entitled to recover actual expenses, which he has incurred out of his own pocket, under the direct instructions of his principal, and on his behalf, but the *onus* of proving this lies heavily on him (the agent).

Held further, that, in the present case, the plaintiff failed to prove that he was acting as an agent, and that the allegation of agency was made for obvious reasons as is generally done in the *Badni* Contracts to evade the consequences of S. 30 of the Indian Contract Act, IX of 1872 (*a*). **Kashmiri Mall v. Girdhari Lal**, 57 P.W.R. 1907 = 71 P.R. 1908.

ROBERTSON AND SILAH DIN, JJ

Reference —(*a*) 80 P.R. 1895, *R*.

(19) S. 30—Liability of principal to pay agent sums due on account of wagering contract. —See **WAGERING CONTRACTS**, No. 1, 79 P.R. 1908 (**F.B**)

(19-a) S. 30—See No. 3, *supra*.

(19-b) S. 37—See No. 1, *supra*.

(19-c) S. 38—See No. 1, *supra*.

(19-d) S. 43—See No. 13, *supra*.

(20) S. 54—*Suit on hundi—Decree for money due on different consideration to that stated in hundi—Validity.*

Where the suit is on the *hundi* alone, and it is shown that the consideration for the *hundi* failed, S. 54 of the Act requires the Court to dismiss the suit. The Court has no right to give a decree for money due on a different consideration to that stated in the *hundi*. **Sami Aiya Thevan v. Rengaiyengar**, 3 M.L.T. 405.

BODDAM, J.

(21) S. 56—*Application of—Sale not completed—Return of deposit—Rescission of contract.*

Contract Act—(Continued).

S. 56 of the Contract Act provides for a case in which the performance of the contract becomes impossible otherwise than by some act of the promisor. The contract does not become void, if the promisor does something which renders the performance of the contract impossible.

Where the parties to a contract agreed to sell and purchase certain property, but did not get the sale completed in ten months after the agreement, and allowed the property to be auctioned, **held**, that the reasonable inference from their conduct was that the parties had rescinded the contract. **Ganga Dei v. Asa Ram**, 4 A.L.J. 778 = A.W.N. (1908), 5 = 3 M.L.T. 177.

BANERJI, J.

(22) Ss. 59 and 60, applicability of, to appropriation of land revenue sent to Collector. See **ACT XI OF 1859 (REVENUE SALE LAW)**, No. 1, 12 C.W.N. 646.

(22-a) S. 60—See No. 22, *supra*.

(22-b) S. 67—See No. 1, *supra*.

(23) S. 69—Oudh Land Revenue Act, III of 1901, S. 142—Purchaser's liability for arrears of Government revenue—Liability as between purchaser and original co-sharers—Contribution between persons equally liable for payment. See **ACT III OF 1901 (LAND REVENUE)**, No. 1, 11 O.C. 279.

(24) Ss. 69 and 70—"Person interested in the payment of money"—Volunteer—Civil Procedure Code, S. 283.

The plaintiffs, alleging themselves to be the purchasers of the mortgagees' rights in certain land, paid the amount of a decree against the mortgagee, in order to save the property from sale. But, it had been already found, in a suit under S. 283 of the Code of Civil Procedure, that the sale to the plaintiffs was fictitious and inoperative. **Held**, that the payment made by the purchasers was a purely voluntary payment, and that the plaintiffs were not entitled to recover the amount, paid (*a*) as above described, from their vendors. **Janki Prasad Singh v. Baldeo Prasad**, A.W.N. (1908), 58 = 5 A.L.J. 163 = 30 A. 167.

STANLEY, C.J. AND BURKITT, J.

References :—(*a*) 2 I.A. 131 and 11 A. 234, *R*.

(25) Ss. 69 and 70—inapplicable to case where income-tax authorities compulsorily collected assessment—S. 14, **Income Tax Act**, not

Contract Act—(Continued).

complied with—Protest that property assessed had passed to others. See ACT II OF 1886 (INCOME TAX), No. 1, 3 M.L.T. 111.

(25-a) S. 70—See Nos. 24 and 25, *supra*.

(26) S. 73—Whether overrides the provision of the Interest Act. See ACT XXXII OF 1839 (INTEREST), No. 2, 1 Sind.L.R. 179.

(27) S. 73—Contract to sell immoveable property—Inability of vendor to make a good title—Damages for breach of contract. See DAMAGES, No. 1, 9 Bom.L.R. 1087.

(28) Ss. 73, 107—*Breach of contract—Damage from the breach—Right to recover damages—Mistake unilateral does not vitiate the contract.*

Where both parties to a contract are agreed as to the sale and purchase of a particular parcel of goods, the mistake of the defendant as to their quality does not invalidate the contract (a).

The Contract Act, 1872, does not sanction or permit an action for breach of contract of sale, save where specific damage is proved to have resulted from the breach. Section 73 of the Act not only confines the right of relief to the party who suffers, but provides how his loss is to be measured, what it is to include and what to exclude and what circumstances the Court must take into account in estimating the loss.

Hence, in cases of breach of contract, it is not permissible to the aggrieved party to file a suit to recover the price of the goods in dispute. Under the Act, the aggrieved party must sell the refused goods and then seek to recover the loss if any accruing on such sale. **P. R. and Co. v. Bhagwandas Chaturbhuj**, 10 Bom.L.R. 1113.

KNIGHT, J.

References:—(a) L.R. 6 Q.B. 597, *F.*, 4 Bing. 722; 5 B.L.R. 276 (292); 19 A. 535; 6 C. 67; 29 I.A. 202=4 Bom. L.R. 793. 30 C. 548=5 Bom. L.R. 621 and 28 C. 577, 578, *L.*

(28-a) S. 74—*Agreement to pay a higher rate of interest.*

Where the stipulation is retrospective, and the increased rate runs from the date of the bond, and not merely from the date of default, it is always to be considered as a penalty within the meaning of S. 74.

*An agreement to pay enhanced rate of interest for the future may be a penalty under S. 74 of

Contract Act—(Continued).

the Contract Act as amended in 1899¹ whatever may have been the law before, and an agreement to pay compound interest combined with one for enhanced rate of interest, being in excess of and outside the ordinary and usual stipulation, should be considered to involve a penalty. But compound interest is in itself a perfectly legal provision and not a penalty.

An agreement to pay a higher rate of interest with a proviso for reduced rate on punctual payment is not the same thing as an agreement to pay the higher rate on default, and if the debtor does not earn the reduction by fulfilment of the condition, no question of penalty arises when the creditor claims the higher rate. **Jagannath Prashad v. Balichand**, 4 N.L.R. 187.

SKINNER, J.J.

References —34 C. 150, 14 C.P.L.R. 53, *F.* 1 N.L.R. 9, *F.* and *qualified*, and **Wallis v. Smith**, 21 Ch. D. 243, *L.*

(29) S. 74—Agreement in this case not considered as a bail-bond or recognisance—Necessity of proving actual damage under the section. See ACT V OF 1881 (LOCAL BOARDS, MADRAS), No. 3 17 M.L.J. 537.

(30) S. 74—Compound interest—Interest at enhanced rate on default, when penal. See PENALTY, No. 1, 11 O.C. 307.

(30-a) S. 107—See No. 28, *supra*.

(31) S. 128—Surety of guardian—Liability—Property not specified in the application for appointment of guardian, dealings with. See GUARDIAN AND MINOR, No. 3, 12 C.W.N. 481.

(31-a) S. 129—Whether liability of surety for administrator a continuing one. See ACT V OF 1881 (PROBATE AND ADMINISTRATION), No. 8, 1 W.N. (1908), 288.

(31-b) S. 151—See No. 14, *supra*.

(32) Ss. 151, 152 and 154—*Bailment—Entrusting for repair the driving beam of a sewing machine to copper-smith—Degree of care—Burden of proof.*

Plaintiff entrusted a driving beam of his sewing machine to defendant, who was a copper-smith, for repair. He wanted a broken tip soldered with copper. Defendant undertook to do the repair. He employed another copper-smith to do the work under his instructions. In the course of the soldering, excessive heat was

Contract Act—(Continued).

applied, and the other tip of the driving beam was melted, rendering the driving beam useless.

Held, in a suit for damages, that S. 151 of the Contract Act governed the case, and that the section required from the defendant the care of a skilled copper-smith.

Held also, that, if a man undertakes, whether for reward or not, to do something requiring special skill, he may be fairly called on, if things go wrong, to prove his competence (a). **Mahomed Ali v. Nga Pe**, U.B.R. (1908), 1st quarter, Contract, p. 11.

G.W. SHAW, ESQUIRE.

References.—(a) *Sin. L.C.*, 1, 167, U.B.R. (1897—1901), II, 387, 3 H. and C. 596, R.

(32-a) S. 152—See No. 32, *supra*.

(32-b) S. 154—See No. 32, *supra*.

(33) S. 178—*Pawnor and pawnee—Pawnor not owner but having a right to possession—Suit by owner for declaration of his title.*

A person, who had obtained possession of certain moveable property belonging to a minor in the capacity of a trustee, and who had been allowed to retain possession of such property after the minor came of age, pawned some of it to persons who were found to have acted negligently perhaps, but honestly and in good faith. *Held*, that the pledge was valid, but the owner was entitled to a declaration of his right to redeem the articles so pawned **Sundar Deo v. Bhagwan Das**, A.W.N. 1908, 57 = 80 A. 165.

* KNOX AND ALKMAN, JJ.

(34) Ss. 191 and 192—Receiver appointing tahsildar to an estate—Relationship—Agent and sub-agent—Suit for accounts against tahsildar, maintainability of. See *ACCOUNTS*, No. 3-a, 8 C.L.J. 114.

(34-a) S. 192—See No. 34, *supra*.

(35) S. 196—Applicability of term "ratification" only to acts done on ratifier's behalf. See *HINDU LAW (WOMAN'S ESTATE)*. No. 1, 12 C.W.N. 398.

(36) S. 221—*Laen*—S. 149, *Indian Companies Act*, scope of—*Effect of winding up order.*

Held, that, in the absence of anything in the agreement between a company and its agent to exclude the operation of S. 221 of the Contract Act, in so far as the expenditure incurred before a winding up order came within that section, the agent was entitled to a lien, that

Contract Act—(Continued).

S. 149 of the Indian Companies Act does not authorise the Court to deprive a secured creditor of possession of his security, and that, where the agent was entitled to remain in possession by virtue of a lien under S. 221 of the Contract Act, the making of the winding up order would not affect his right to remain in possession and continue to make the necessary disbursements. **Chidambaram Chettiar v. The Tinnevely Sarangapani Sugar Mills Co., Ltd.**, 3 M.L.T. 247 = 31 M. 123 = 18 M.L.J. 251

WALLIS AND MILLER, JJ.

(37) S. 231, scope of—"Discloses himself," construction of—Third party's right to repudiate contract by agent when arises, where principal undisclosed. See *Civ. Pro. CODE*, No. 337, 6 Bom L.R. 731 = 32 B. 356.

(38) S. 245—*Liability of retiring partner.*

A partner who has retired before a certain transaction with the firm to which he had belonged takes place, cannot be held responsible unless it can be shown that the transaction was with either a previous customer or one who was aware that the retired partner had been a partner. When a person enters into a transaction with a firm without even knowing that a certain person who has already retired ever had been a partner, such latter person is clearly not liable to him whether he has notice of the retirement or not (a), unless he has actually held himself out to be a partner, a position which gives rise to a different class of consideration.

If a person is a member of a firm, and known to be such, persons dealing with the firm may be influenced by his credit, and unless he takes proper steps to make his retirement clear, he will be held responsible to them who knew of his partnership and might have been influenced by the fact. But it is definite personal knowledge which is required, not the vague impression that, because a firm once belonged to a joint Hindu family, all members of that family, who may exist, although not personally known to the customer to exist, will for ever be liable, unless they take definite steps to disabuse him of his vague impression. It cannot be held as a principle that when a person has dealings with a man who was once a member of a joint Hindu family and competent to pledge the resources of that family, such person can hold all the members, who once

Contract Act—(Concluded).

constituted a joint Hindu family, responsible, unless they have taken the precaution publicly to proclaim their partition.

If it be shown that the father of a minor son had notice of a fact, such minor cannot say that he had no notice. *Mian Amar Singh v. Seth Chand Ma*, 137 P L.R. 1908 = 102 P.W.R. 1908.

CHATTERJI AND ROBERTSON, JJ.

Reference :—(a) 78 P.R. 1903, R.

(39) Ss. 249 and 264—Retirement of dormant partner—Notice of dissolution of partnership—His liability. See *PARTNERSHIP*, No. 6, 75 P.R. 1908.

(40) S. 251, application of,—See *PARTNERSHIP*, No. 8, 4 M.L.T. 66.

(41) S. 253—Partnership—Distribution of assets—Contribution to losses See *PARTNERSHIP*, No. 5, 40 P.R. 1908.

(42) S. 253—Partnership dissoluble at will See *PARTNERSHIP*, No. 11, 4 M.L.T. 478.

(43) S. 253 (7)—One partner expelling another—Partnership whether dissolved—who can expel partner. See *PARTNERSHIP*, No. 2, 12 C.W.N. 455

(44) S. 263—Presentation of plaint by managing member of partnership—Validity. See *PARTNERSHIP*, No. 4, 1 Sind. L.R. 191.

(44-a) S. 264—See No. 39, *supra*.

Contribution.

(1)—suit for—appropriate procedure imposed on one of many judgment-debtors getting a transfer of decree. See *CIV. PRO. CODE*, No. 127, 10 Bom L.B. 89.

(2)—when mortgagee purchases a share in the equity of redemption from one of the heirs of the mortgagor. See *MORTGAGE (GENERAL)*, No. 9, 12 C.W.N. 745.

(3)—between persons equally liable for payment of Government revenue. See *ACT III OF 1901 (LAND REVENUE)*, No. 1, 11 O.C. 279.

Conveyance.

Document whereunder executant relinquishes his rights over certain property of his, but receives specific amount for bargain is—, not release. See *STAMP ACT (II OF 1899)*, No. 12, 10 Bom. L.R. 730.

Co-owners.

(1) *Co-sharer cultivating joint waste land previously uncultivated—Other co-sharers entitled to a decree for joint possession.*

A co-sharer, who cultivates joint waste land (known as *banjar* land) previously uncultivated cannot deny the rights of his co-sharers to joint possession of that land (a). The co-sharers, who are thus entitled to a decree for joint possession, should pay their quota of the expenses of bringing the land under cultivation, if a claim for the same is made by the co-sharer cultivating the land. *Ratanlall v. Chandan-singh*, 4 N.L.R. 114.

BATTEN, A.J.C.

Reference .—(a) 13 C.P.L.R. 153, R.

(2) *Express surrender of holding by tenant, how effected—Right of co-owners—How one of several co owners of an undivided village acquiring a tenant-right exclusively for himself, may be treated by other co-owners—Unreasonable delay, what amounts to—Arts. 120, 127, 144, Sch. II, Limitation Act*

An express surrender by a tenant of his tenant-right can only be effected by a contract between the tenant and his landlord. Where there are several co-owners constituting the landlord, one may act for all, with express or implied authority from the others, in taking a surrender from a tenant. But one of several co-sharers, dealing with a tenant for his own benefit, is neither "the landlord," nor an agent of the proprietary body. Where the proprietary body consists of several persons in an undivided village, the term "landlord," as used in the Central Provinces Tenancy Act, applies only to the aggregate of such persons. It has therefore been held that where, by law, the transfer of a tenant-right requires the consent of the landlord, such consent can only be validly given by the whole proprietary body. No one co-owner acting for himself, or otherwise than for the whole proprietary body, can accredit it. A transaction whereby one such co-owner acquires, (not in his representative capacity) a tenant-right in the village under a contract with the tenant amounts to a *transfer* and not to a *surrender* of the holding.

Where one of several joint co-owners of an undivided village acquires the occupancy right of a tenant and thereby becomes himself the exclusive occupant and cultivator of a parcel of the joint tenancy, the other co-owners may

Co-owners—(Continued).

either *conjointly* ratify the transaction and accept the acquiring co-owner as a tenant of the whole proprietary body, or allow him to occupy the land exclusively, as part of the general arrangement among the co-owners for the occupation and enjoyment of the undivided estate. Otherwise, they may *individually* regard the right to occupy the land as lapsed to the proprietary body, and each may claim joint physical possession thereof with the acquiring owner to the extent of his share (a) But a claim of this kind is one to be dealt with in accordance with principles of equity (b), and any unreasonable delay in advancing it must defeat it upon the basis of the principle, "delay defeats equities." What amounts to an unreasonable delay is a question for determination by the Court according to the particular circumstances of each case as it comes up to decision. A suit to enforce this particular claim for joint or common occupation by one co-owner of joint or common land against another co-owner, who has taken up exclusive enjoyment of such land, not in denial of the joint or common title, but merely as a mode of enjoying his share in the property, is a suit governed by Art. 120 of the Limitation Schedule. Art. 127 or Art. 144 is not applicable to the case. **Ramdayal v. Gulabai Bai**, 4 N.L.R. 120.

STANTON, A.J.C

References :—(a) 1 N.L.R. 108, 17 C.P.L.R. 17; 10 C.P.L.R. 40, *cited*; 28 C. 223, R; 27 A. 88, *dissented from*. (b) 18 C. 10, R.

(3) *Joint property—Right of co-owner to have partition—Agreement among the owners that shares should remain joint—not enforceable.*

There were four brothers jointly entitled to certain Zemindari property. One of the brothers died childless. Another brought a suit against the sons of the two others for partition. A compromise was entered into among the then defendants that their shares should remain joint. The plaintiff who was a defendant to that suit now applied under S. 110, Land Revenue Act, to have his share separated :—

Held, that the application was maintainable.

The right of a co-owner to have partition of his share is incident to the right of ownership, and an agreement not to partition for an indefinite period would be contrary to that right,

Co-owners—(Continued).

and, therefore, not enforceable. **Chandar Shekhar v. Kundan Lal**, 5 A.L.J. 672—A.W.N. (1908), 259.

STANLEY, C.J. AND BANERJI, J.

(4) *Co-sharer landlords—Separate collection—Right of sharer to sue for whole rent making co-sharers defendants—Bengal Tenancy Act (VIII of 1885), S. 188—"Required or authorised to do" under the Act—Filing of suit—General principles of legal procedure.*

Agreement, either expressly proved or implied by the conduct of the parties, may establish the right of co-sharer landlords to sue separately for the shares of rent recoverable by them. But such an arrangement merely affects the right to sue separately for rent, and in no other respect modifies the terms of the holding. The right to bring the tenure to sale for arrears of rent remains intact, as also the right of one sharer to sue, making his co-sharers defendants when they will not join as plaintiffs.

The filing of a suit is not a thing, which the landlord is, under the Bengal Tenancy Act, required or authorised to do, and S. 188 of the Bengal Tenancy Act is no bar to a sharer suing (under the general rules of legal procedure) for the whole rent of the tenure, making his co-sharers, who refuse to join as plaintiffs, defendants in the suit. **Raja Pramada Nath Roy v. Raja Ramani Kanta Roy**, 12 C.W.N. 249 (P.C.).

LORD ROBERTSON, LORD COLLINS, AND SIR ARTHUR WILSON.

(5) *Joint property—Co-sharer building on joint land without the permission of the other co-sharers—Injunction.*

One of several joint owners of land is not entitled to erect a building upon the joint property, without the consent of the other joint owners, notwithstanding that the erection of such building may cause no direct loss to the other joint owners. **Lachhani v. Ganga Din**, A.W.N. (1908), 19.

STANLEY, C.J. AND BURKITT, J.

References :—12 A. 486; 18 A. 115, F.

(6) *Suit for removal of building constructed by a co-sharer without the consent of others—Co-sharers—Joint land, building erected by a co-sharer on*

Co-owners—(Concluded).

Where a co-sharer constructs a building on land belonging to him and other co-sharers jointly without their consent, *held*, that the other co-sharers are entitled to have the building removed, if they have objected to it at the first possible opportunity and no great injury will thereby be caused to the co-sharer who has erected the building(a). **Bhim Shankar Dat v. Ganga Dayal**, 11 O.C. 355.

CHAMIER, J.C.

References.—(a) 7 O.C. 336 ; A.W.N. (1908), 19, 2 A.L.J. 455, S.C. 270, *R.*

(7) Assignment by a co-owner, without objection by the other—Assignment of whole debt due to a shop—Validity. See **ASSIGNMENT**, No. 2, 3 M.L.T. 294.

(8) Exclusive possession of co-owner of joint property, whether amounts to adverse possession as against his co-owners. See **ADVERSE POSSESSION**, No. 3, 5 A.L.J. 511.

(9) One of the share-holders of property purporting to mortgage the whole—Right of other share-holders to declaration—Subsequent conduct of defaulter, effect of. See **DECLARATION**, No. 1, 8 C.L.J. 185.

(10) Rights and position of vendee of a share in joint mortgaged property when it is redeemed in part or whole by his money. See **VENDOR AND VENDEE**, No. 1, 64 P.W.R. 1908.

(11) See **ABANDONMENT**, No. 1, 120 P.R. 1908

Co-parcenary.

Release by a co-parcener—Right of the co-parcener's son then in existence to recover his share in the family property—Right of an after-born son, in the property. See **HINDU LAW (JOINT FAMILY)**, No. 13, 10 Bom. L.R. 778.

Copyright.

(1) *Copyright—Infringement—Catalogue, illustrations in—Copyright in a portion of a publication, how far protected—Fraud on the public—Misstatements—"Puffing" statements.*

The fact that the copyright in some of the illustrations in the plaintiff's catalogue is vested in other persons does not preclude him from suing to restrain an infringement of such of the illustrations as he has the copyright in (a).

Copyright—(Concluded).

The objection that the catalogue contained certain statements which were not strictly accurate (no case of fraud on the public having been made in the written statement) was held to be no answer to an action to prevent infringement of the copyright, such statements being held to be in the nature of "puffing" statements (b).

It was not sufficient for a defendant merely to give an undertaking not to publish in future those illustrations which he admits to be infringements of copyrights. He ought to have, at the commencement of the suit, offered to consent to an injunction being recorded regarding them. **S Lawrence v. W. Bushnell**, 12 O.W.N. 753.

FLETCHER, J.

References.—(a) (1892) 3 Ch. 462, *F*; (b) March 16, (1883) 10 R. 801.

Corporation.

(1) *Bank of Bombay—Shareholder's right to inspect and take extracts—Special interest and definite object, necessary—Suit for declaration of right to inspect, in the nature of application for writ of mandamus—Conditions on which relief can be given.*

A suit brought against the Bank of Bombay by a shareholder for a declaration that he is entitled to inspect the register of shareholders and to copy and take extracts from such register is, in its nature, though not in its form, somewhat of the character of an application for a writ of *mandamus*, and the principles regulating the issue of that prerogative writ should apply to a great extent to the granting of the relief prayed for in such a suit.

A writ of *mandamus* will not be allowed to issue unless the applicant shows clearly that he has the specific legal right, to enforce which he asks for the interference of the Court, that he has claimed to exercise that right and none other, and that his claim has been refused.

When, therefore, before the suit, the plaintiff claimed an absolute right to inspect and take extracts from the Bank's register of shareholders—to which he was not entitled—and was refused, but in the suit claimed a more qualified or restricted right,

held, that the suit could not succeed.

The right to inspect the documents of a corporation which at Common Law belongs to every member of such corporation is not an absolute right, but is confined to cases where

Corporation—(Concluded).

the member of the corporation has in view some definite right or object of his own and to those documents which would tend to illustrate such right or object.

Where it appeared that the plaintiff had no special interest in any of the matters he complained of, or any interest other than or different from that of each member of the corporation, and had no definite right or object of his own to aid or serve in asking for inspection of the register, or right or object which the register would illustrate, but his object was to obtain the inspection in order to communicate with the shareholders with the view of securing their help in bringing about an improvement in the administration of the corporation's affairs.

Held, that no relief could be granted to the plaintiff (a). **The Bank of Bombay v. Suleman Somji**, 12 C.W.N. 825 (P.C.)

LORD MACNAGHTEN, LORD JAMES OF HEREFORD, LORD ATKINSON, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

Reference :—(a) 2 B. and Ad. 115, F.

(2) Collector, Chaplain, etc., whether Corporation sole—Effect of constituting such persons as trustees. See ACT II OF 1882 (TRUSTS), No. 1, 1 Sind L.R. 218.

Costs.

(1) *Execution of decree—Attachment—Objection to attachment successful, but costs not allowed—Costs of objection not recoverable in separate suit.*

Attachment of certain property in execution of a decree being made, objections were put in by persons, who claimed the attached property as their own. These objections were successful, but, for some reasons not explained, the objectors were not allowed costs. The objectors instituted a suit against the decree-holder to recover damages for unlawful attachment and the costs incurred in making objections. *Held*, that the costs claimed could not be recovered by means of a separate suit. **Sailg Ram v. Tika Ram**, A.W.N. (1908), 18 = 5 A.L.J. 140.

AIKMAN, J.

References :—8 A. 452, 9 A. 474, F.

(2) *Practice as to allowing costs of counsel—Costs of third counsel in a defended long cause—Party and party costs—Attorney and client costs—Practice governing the*

Costs—(Continued).

allowing of costs—Taxing Master's decision—Review by the Chamber Judge—High Court Rules and Forms, Rule 577.

As a general rule, the Judge in Chambers will not interfere with items of taxation which are entirely within the Taxing Master's discretion, or go into details of such discretionary items but there is nothing to prevent him from doing so, if it appears to him, that the interests of justice require his interference; and it would be his duty in all such cases to review and revise taxation and judge and decide for himself what would be a just order to make under the circumstances.

Where a party to a suit has already briefed two Counsel for hearing, and a third is instructed to make an application to transfer the case from one Judge to another, the costs shall be, in the absence of any order making the costs, costs in the case, disallowed between party and party, though they may be allowed between attorney and client.

A party to a defended long cause is entitled to appear by two Counsel. If both Counsel attend throughout the hearing and the other party is ordered to pay the costs of the suit, their brief fees and full refreshers would be allowed on taxation against the losing party. If the suit is conducted by one Counsel only throughout, the full refreshers of the conducting counsel and a nominal refresher of 2 G. Ms. of the other Counsel would be properly allowable against the opponent if ordered to pay costs. If the absent Counsel attends for portions of the time the case is at hearing, his refresher proportionate to the time he attends would also be properly allowable in addition to the full refresher allowed to the Counsel who attends and conducts the case.

When a party to a defended long cause engages two Counsel, he has a right to the services of at least one of them. He is under no obligation whatever to engage a third Counsel. If both Counsel find that they would, owing to other engagements, be unable to go on, and conduct the case when it is called, it is obviously the duty of one of them to return the brief.

A party is at liberty at any time to employ a third Counsel, but this right of employing a Counsel must not be allowed to work hardship on the losing opponent.

Costs—(Continued).

If three Counsel are engaged before the hearing, it will be for the Taxing Master to consider the fees and refreshers of which two he will allow between party and party, and which Counsel-fees should go between attorney and client. A Solicitor engaging three Counsel is entitled, in the event of his recovering costs from the opponent, to have his third Counsel's costs taxed between attorney and client, if he proves express authority from his client, or if he proves that some peculiar contingency arose, which made it necessary for him to engage a third Counsel in order to safeguard his client's interest.

If a third Counsel is added after the hearing of the suit has commenced, such addition must be at the cost of the party doing so. **Banoo Begum v. Mir Aun Ali**, 9 Bom. L.R. 983—32 B. 262.

DAVAR, J.

(2-a) Attorney's application for taxation of his bill of—for business not transacted in Court, Judge's power to make order on. See HIGH COURT RULES (BOMBAY), No. 6, 10 Bom. L.R. 76

(3) Suit for, by attorney against client—Limitation—Order for taxation of costs, effect of. See LIMITATION ACT, No. 20, 35 C. 171.

(4)—awarded by decree directing sale of mortgaged property—Part of mortgage decree—Procedure to be adopted by decree holder for recovery of. See TRANSFER OF PROPERTY ACT, No. 60, 12 C.W.N. 364.

(5)—respondent's failure to furnish security for—Order refusing to re-admit appeal—Appeal. See CIV. PRO. CODE, No. 298, 5 A.L.J. 109.

(6) Order on a petition for withdrawal of a suit with liberty to file a fresh suit—Order as to costs. See CIV. PRO. CODE, No. 281, 10 Bom. L.R. 293.

(7) Conditions of liability of infant plaintiffs to give security for. See CIV. PRO. CODE, No. 240, 18 M.L.J. 155.

(8) Jurisdiction of Court to award costs of one successful defendant against another unsuccessful defendant. See JURISDICTION (OF CIVIL COURTS), No. 2, 57 P.W.R. 1908.

(9) Plaintiff not only claiming reliefs to which he was not entitled, but also omitting to state all material facts which would entitle him to any relief—No order for costs to be made. See SALE, No. 2, 14 Bur. L.R. 135.

Costs—(Concluded).

(10)—on memorandum of objections when appeal withdrawn. See PRACTICE, No. 16, 4 M.L.T. 482.

(11) Hearing of partition suit prolonged on account of defendant's unfounded contentions—Defendant to pay costs of subsequent hearing. See MAHOMEDAN LAW (PARTITION), No. 1, 13 C.W.N. 158.

(12)—decree are recoverable under S. 90, Transfer of Property Act. See TRANSFER OF PROPERTY ACT (IV OF 1882), No. 62-a, 11 O.C. 377.

Co-trustee.

Application to be registered as—under the Bengal Land Registration Act—Jurisdiction of Civil Courts to direct registration by revenue authorities. See BENGAL ACT VII OF 1876 (LAND REGISTRATION), No. 1, 12 C.W.N. 441 (P.C.).

Counsel.

(1) Refusal by counsel to urge question of law—mere admission of law not binding on party—Question may be raised in appeal though not raised below—Limitation. See ACT VIII OF 1885 (BENGAL), No. 24, 7 C.L.J. 152.

(2) Counsel not able to appear—Return of brief by junior counsel—Practice. See CIV. PRO. CODE, No. 85, 10 Bom. L.R. 1172.

(3) Plaintiffs in short causes—Taxing master to allow counsel's fees, if he is of opinion that it was not unreasonable to submit the plaintiffs to counsel to be drafted or settled. See CIV. PRO. CODE, No. 70, 10 Bom. L.R. 969.

(4)—See COSTS, No. 2, *supra*.

Court.

(1) *Court's process, abuse of—Wrong done by order of Court—Court's inherent power to rectify—Events happening after the filing of appeal.*

When an order has been improperly or fraudulently obtained from a Court, as soon as the Court is apprised of the fact, it will recall the order, on the ground that no Court will tolerate an abuse of its process. The Court has inherent power to do so (a).

When there has been a wrong done by an order of Court which has been set aside on appeal, the Court executing the decree without express authority of law is competent to put the parties in the position which they occupied before that order.

Court—(Concluded).

It is not only competent to a Court of appeal, but it may be its duty, under certain circumstances, to take notice of events which have happened since the order challenged in appeal was made. **Udit Chobey v. Rashika Prasad Upadhyaya**, 6 C.L.J. 662=3 M.L.T. 41

MOOKERJEE AND CASPERSZ, JJ.

Reference.—(a) 6 C.W.N. 710, R

(2) Duty of, to relieve parties against injustice caused by its own acts or oversight. See **LIMITATION ACT**, No. 18, 7 C.L.J. 59.

(3) Suit for possession—Failure of cause of action—Possibility of *media concludendi* being the same in other actions gives the Court no power to pronounce upon them. See **POSSESSION**, No. 1, 7 C.L.J. 44.

(4)—, competency of, to pass final decree for partition under S. 396, C.P.C., without application by parties. See **CIV. PRO. CODE**, No. 243, 18 M.L.J. 23.

(5)—has power, in effecting a partition, to allot to share of one co-parcener property alienated by him. See **HINDU LAW (PARTITION)**, No. 1, 17 M.L.J. 617.

(6) Inherent power of—to set aside *ex parte* decree made under S. 90, **TRANSFER OF PROPERTY ACT**. See **TRANSFER OF PROPERTY ACT**, No. 61, 35 C. 767.

(7) Inherent power of Court to correct its own mistake Amendment of sale certificate—Sale certificate including a property not sold—**CIV. PRO. CODE**, S. 244. See **CIV. PRO. CODE**, No. 148, 12 C.W.N. 1027.

(8) Power of Court to inspect documents and to record evidence on the validity of objection regarding production or admissibility. See **EVIDENCE ACT**, No. 35, 4 M.L.T. 317.

(9) Power of, to settle a scheme of management of trust See **MAHOMEDAN LAW (WAKF)**, No. 4, 13 C.W.N. 26

Court-fee.

(1) *Court-fee—Written statement of defendant claiming set-off—Does not require ad valorem Court-fee—Appeal—Civ. Pro. Code, Act XIV of 1882, S. 588 (7).*

Held, that, *ad valorem* Court-fee is not required on a written statement in which defendant does not allege any definite and ascertained sum to be due to him and does not pray for passing any decree therefor, but merely pleads, that he is entitled to get from the plain-

Court-fee—(Concluded).

tiff damages arising out of the transaction on which plaintiff's claim is based, and that the amount of such damages may be set off against the said claim (a). **Bhagat Singh v. Devi Dial**, 80 P.W.R. 1908=130 P.L.R. 1908=85 P.R. 1908.

KENSINGTON AND RATTIGAN, JJ.

References.—(a) 9 Bur. L.R. 285 (F.B.)—Opinion of Banerji, J., 8 C.W.N. 174, F.; 8 A. 376, 13 B. 672, 15 M. 29 and 8 C.W.N. 174, Diss; 7 A. 284 and 15 A. 9, R.

(2) *Court-fee on plaint—Reg III of 1872, Ss. 5, 8—Settlement—Suit instituted before Settlement Officer without Court-fee—Transfer to Civil Court—Court-fee on plaint if leviable.*

No institution Court-fee need be paid when a suit, which was instituted before a Settlement Officer under the provisions of Reg III of 1872 without Court-fee, was transferred to a Civil Court under S. 5 of the Regulation. **Bibee Golap Kumari Saheba v Md. Kadiruddin**, 12 C.W.N. 917

RAMPINI AND SHARFUDDIN, JJ.

(3) *Mortgage suit—Compromise decree—Appeal from order refusing to make order absolute—Transfer of Property Act (IV of 1882), S. 89—Ad valorem Court-fee.*

Ad valorem Court-fee on the value of the appeal should be paid on the memorandum of appeal from an order refusing an application for an order absolute under S. 89 of the **Transfer of Property Act** (a). **Charu Chandra Mitter v. Bhagirath Persad**, 12 C.W.N. 1028.

MITRA AND CASPERSZ, JJ.

Reference.—(a) 25 C. 133, R.

(4) Suit for partition—**CIV. PRO. CODE**, S. 562—Remand—Appeal—Court-fee. See **APPEAL**, No. 3, A.W.N. (1908), 40.

(5) Assessment of Court-fees in suit for declaration that decree was fraudulent. See **SPECIFIC RELIEF ACT**, No. 9, 8 C.L.J. 485.

Court Fees Act

(1) *S. 7—Court-fee—Suit to obtain possession of property leased to plaintiff—Suit for specific performance—Appeal.*

Held, that a suit by a lessee to obtain possession of land comprised in his lease, but of which possession has not been given, is not a suit for specific performance, to which S. 7, clause X of the **Court Fees Act**, 1870, is applicable,

Court Fees Act—(Continued).

but is governed as to payment of stamp duty by S. 7, cl. V of the Act. **Ghulam Sabir v. Narain Prasad**, A.W.N. (1908), 201=5 A.L.J. 584.

AIKMAN, J.

- (2) *S. 7, cl. 1—Mortgage—sale—prior mortgages—no relief—redemption—fee payable on the plaint.*

Plaintiffs brought a suit for sale upon a mortgage. It was discovered that there were two prior mortgages on the property in respect to which no relief was claimed and no Court-fee paid. The Court below, however, decreed the suit, and held the plaintiffs entitled to redeem the prior mortgages without directing the sale to satisfy those debts. *Held* that the Court-fee, paid on the plaint, was sufficient, having regard to the relief claimed. **Indar Sen Singh v. Rikhi Singh**, 5 A.L.J. 18=A.W.N. (1908), 31=3 M.L.T. 165=80 A. 103.

STANLEY, C. J. AND BURKITT, J.

- (2-a) *S. 7 (IV) (b)—Civ. Pro. Code, S. 215 A, preliminary decree under—Amount of Court fees to be paid on appeal.*

In an appeal against a preliminary decree, under S. 215-A, C.P.C., 1882, the appellant ought, under S. 7 (iv) (b), Court Fees Act, 1870, to pay an *ad valorem* Court-fee on the amount at which the suit was valued in the plaint. **Bhagat Ram v. Gokal Chand**, 150 P.R. 1908.

KENSINGTON AND LAL CHAND, JJ.

Reference :—18 B. 209, *relied on*.

(3) *S. 7 (IV) (c)—Suit for removal of mutwali and imam of a mosque—Plaintiffs not seeking possession of the mosque properties for themselves—Court fee. See LIMITATION ACT, No. 36. 87 P.W.R. 1908.*

(4) *S. 7 (IV) (c), Art. 17 (6)—Suit to direct registration of will—Art. applicable. See JURISDICTION (OF MUNSIF'S COURTS), No. 1, 17 M.L.J. 573:*

(5) *S. 7 (IV) (f)—Administration suit—Court-fee to be computed *ad valorem* on estimated value of a share claimed by plaintiff—Value for purposes of jurisdiction. See VALUATION OF SUIT, No. 4, 4 L.B.R. 279.*

(6) *S. 7 (V) (e)—Suits Valuation Act (VII of 1887), S. 3 (1) Rules under—Rule I (c)—Court-fee—Garden—Fruit garden.*

Court Fees Act—(Continued).

Held, that, for purposes of Court-fee and jurisdiction, a fruit garden is a "garden" even though the garden land is assessed to revenue. **Siri Dhar v. Amar Nath**, 61 P.L.R. 1908=84 P.W.R. 1908.

CLARK, C.J., AND REID, J.

- (7) *Ss. 7 (V) (e) and 9—Suit for possession of house—Decree on payment of value of improvements—Appeal—Jurisdiction—Valuation of suit for purposes of Court-fee and appeal—S. 39, Punjab Courts Act, 1884.*

The petitioner sued for possession of a house, which he valued at Rs. 90, in the Court of a Munsiff of the first class, and obtained a decree for possession, on payment of Rs. 684-7-0, value of improvements to the house by the defendant. He appealed to the District Judge against so much of the decree as awarded compensation for improvements, and the District Judge held that he had jurisdiction and that the Court-fee must be made up to Rs. 650, and, on failure to make up the Court-fee, dismissed the appeal.

Held, that, the subject matter of the suit being a house, the market value of the house as found by the first Court for Court-fee determined the course of an appeal under S. 39 of the Punjab Courts Act, 1884; that the District Judge had no jurisdiction to entertain and hear the appeal, and, that, under S. 7 (V) (e) of the Court Fees Act read with S. 9 of the Act, the valuation for the purposes of Court-fee and for jurisdiction should be the same (a). **Abdur Rahman v. Charag Din**, 19 P.R. 1908 (F.B.).

REID, RATTIGAN AND LAL CHAND, JJ.

References —(a) 6 P.R. 1904 (F.B.) and 72 P.R. 1899, F., 3 P.R. 1893, 33 P.R. 1884 (F.B.), 23 M. 84, 101 P.R. 1900, R; 1 P.R. 1887, 44 P.R. 1888 (F.B.), 169 P.R. 1888, and 16 P.R. 1908 (F.B.), *Expl*

(8) *S. 7, cls. 5 and 11 (e)—Landlord and tenant—Suit by tenant to recover possession of land against landlord and persons claiming under him—"Occupancy of land" and "ejected"—Applicability to claim of melwaram in land.*

A suit for possession by a tenant against the landlord and persons claiming melwaram rights under him is governed by cl. 5 and not by cl. 11 (e) of S. 7 (a).

Court Fees Act—(Continued).

The terms of cl. 11 (e) and especially the words "occupancy of land" and "ejected" are applicable to the case of ryots in actual physical occupation, rather than to persons who are only entitled to the melwaram rights. **Pala-niappa Chetti v. Sithravelu**, 17 M.L.J. 478=3 M.L.T. 8=31 M. 14.

BENSON, J.,

Reference.—(a) 32 C. 628, F.

(9) S. 7 (e), cl. IX, p. Sch I, Art. 1 applies to appeals in mortgage suits—Court-fee payable on subject-matter in dispute in appeal.

Held, that the Court-fee in an appeal arising out of a suit for foreclosure is payable on the subject-matter in dispute in appeal and not on the principal money secured by the mortgage (a). *In the matter of the petition of Mahadeo Prasad*, 5 A.L.J. 531=A.W.N. (1908), 247=4 M.L.T. 448.

AIKMAN, J.

References.—(a) 27 A. 447 and reference under Court Fees Act, 29 M. 367, F.

(10) S. 7, sub-s. V, cls. (a) and (d)—*Revenue-paying estate—Suit for possession of share in—Court-fee on plaint*—"Definite share," if must also be separately assessed with revenue.

In a suit to recover possession of a definite share in a permanently settled revenue-paying estate, the Court-fee on the plaint should be calculated according to the first part of cl. (a) of S. 7, sub-s. V of the Court Fees Act, i.e., at ten times the proportionate revenue annually payable. Whether such share is recorded in the Collector's register as separately assessed with revenue or not, does not matter.

The words "definite share" in the first part of the clause, do not mean a definite share separately assessed with revenue (a). **Buniad Lal v. Shyam Lal**, 12 C.W.N. 990.

CASPERSZ AND SHARFUDDIN, JJ.

Reference.—(a) 8 C. 192, R.

(10-a) S. 9—See No. 7, *supra*.

(11) S. 11—*Suit for damages—Approximate assessment of damages in plaint—Offer to pay additional Court fees if more damages are due.*

In a suit for damages based on fraud, there is nothing in S. 50 of the Civ. Pro. Code, or in the Court Fees Act, to prevent a plaintiff, from entering in his plaint an approximate estimate

Court Fees Act—(Continued).

of the damages he claims, and offering, if they prove heavier than he anticipates to pay the necessary institution fee to cover the difference though the suit may not then fall within the provisions of S. 11 of the Court Fees Act, and the plaintiff may not be entitled to deposit the institution fee after decree; but where the plaintiff has paid it before the hearing of the appeal, nothing should prevent the lower appellate Court from passing a decree fully for the amount claimed. **Ragavaji Sait v. Annamalai Mudali**, 17 M.L.J. 625.

MILLER, J.

(12) S. 17—*Alternative reliefs for distinct causes of action, Court-fees payable on.*

Held, that S. 17 of the Court Fees Act applies not only to a case in which cumulative reliefs are sought but also to a case in which the plaintiff claims alternative relief in respect of different causes of action (a). **Jawahir Singh Baldeo Prasad**, 11 O C. 173.

CHAMBER AND GREENE, J. CH.

References.—(a) 7 O.C. 152 and 15 B. 82, R; and 30 M. 61, F.

(13) S. 19 (c)—*Annulling the grant of a probate under S. 234, explanation (4) of Act X of 1865—*

A fresh application for a fresh grant—Exemption from Court Fee. See ACT X OF 1865 (SUCCESSION), No. 5, 1 Sind. L.R. 177.

(14) S. 19 (c)—*Letters of administration de bonis non—Court-fee.*

In this case letters of administration had previously been issued in respect of the whole property in respect of which letters are now asked for. The full fee chargeable on the property at the value there placed upon it was levied. *Held*, that no further Court-fee was leviable on a subsequent grant of letters of administration under S. 229 of the Indian Succession Act, in respect of an unadministered portion of the estate, although the value of the property might have increased in the mean time. **Samuel Balthazar**—petitioner, 4 L.B.R. 255.

MOORE, J.

(15) Sch. II, Art. 17—*Partition suit—Fixed fee or ad valorem fee.*

A suit for partition of joint property is governed by Sch. II, Art. 17, Cl. vi of the Court Fees Act, and the plaint is properly stamped, if a Court Fee of ten rupees is paid upon it. A mere denial on the part of the defendant as to

Court Fees Act—(Concluded).

plaintiff's title and possession does not convert the suit into one for declaration of title and recovery of possession; the plaintiff is entitled to maintain a suit for partition, if his possession to some part of the joint property is admitted or established, but if it is established that he is not in possession at all of any portion of the joint property, that there has been a complete ouster, he must sue for recovery of possession and partition and pay *ad valorem* Court Fees upon a plaint appropriately framed for the purpose. **Bidhata Rai v. Ram Chariter Rai**, 12 C.W.N. 37 = 6 C.L.J. 651 = 3 M.L.T. 33.

MOOKERJEE AND CASPERSZ, JJ.

- (16) *Sch. II, Art. 17, cl. (i)*—Civil Pro. Code, S. 283—*Suit under—Stamp on the plaint—Declaratory suit and injunction—Value of suit.*

Where a suit is brought under S. 283 of the Civ. Pro. Code, the proper Court-fee payable on the plaint is Rs. 10 under cl. (i) of Art 17 of Sch. II of the Court Fees Act (a).

When a suit asks for a declaration and for an injunction, it is not one merely for a declaratory decree, but also for consequential relief.

When a plaintiff seeks to challenge a decree in execution of which his property has been attached, the value of the action is the value to the plaintiff, so that, if the execution debt exceeds the value of the property, the latter is the value of the suit, and if the execution debt is less than the value of the property, the former is the value of the suit.

In suits to set aside summary decisions, as also in those dealing with arbitration awards the amount of Court Fees payable on the plaint does not depend upon the value of the suit. **Bibi Phul Kumari v. Gansyam Misra**, 7 C.L.J. 36 (P.C.).

LORD ROBERTSON, LORD COLLINS AND SIR ARTHUR WILSON.

Reference :—(a) 9 B. 20, 422r.

Court of Wards.

- (1) *Trespass—Court of Wards, what estate can be taken possession of by—"Proprietor," meaning of—Infant beneficiary, if proprietor, when estate vested in executrix—Residuary legatee, when estate vests in—Court of Wards Act (IX of 1879, B.C.)—Notice of suit, when necessary—Code of Civil Procedure (Act XIV of 1882), S. 424—Injunction, suit for, if notice required for—Jurisdiction*

Court of Wards—(Continued).

Cause of action—Immoveable property within jurisdiction—Acquisition by executrix—Mal-administration, who to determine—Trespass, under order of higher official, who liable for—Power of Court of Wards to override wishes of testators—Possession, disturbance of—Remedy, injunction or ejectment action.

The Court of Wards can take possession only of an estate of a minor, if he can be said to be the proprietor thereof within the meaning of the Court of Wards Act, and has no right to take over an estate from an executrix in whom the estate is vested in law, until the infant beneficiary becomes the proprietor.

A residuary legatee does not become the "proprietor" of the estate until the administration has been completed and the residue ascertained and made over by the executrix to him.

The Court of Wards Act was never intended and the language thereof does not warrant the construction that it should have power, to override private rights, such as the wishes of testators and proprietors generally in desiring and directing that their estate should vest in and be managed by an executor or in creating a trust *inter vivos* for the benefit of an infant.

When public officers are sued not in their admitted official capacity but as individual trespassers, no notice under S. 424 of the Code of Civil Procedure is necessary.

Even in a case where such a notice would be otherwise necessary, so far as the suit sought relief by an injunction to restrain the commission of an act, no notice under that section would be necessary.

An acquisition by an executrix for an estate, out of the assets of the estate, is a part thereof, even if the acquisition has taken place after a declaration by the Court of Wards taking over the management of the estate.

The High Court may entertain an action in respect of immoveable property, provided that a portion of such property is within the jurisdiction.

Where, although but a portion of the estate regarding which certain declarations and injunction are sought in an action is within its jurisdiction, the High Court has power to grant the same declarations and injunction as regards the whole estate.

Court of Wards—(Concluded).

Where there had been an undoubted disturbance of plaintiff's possession, some rents having been collected and appropriated by the defendant and the plaintiff's establishment directed to obey the order of the defendant, but, no mutation of names having been effected, the rents had been collected and money-orders cashed in the name of the plaintiff and her establishment taken over by the defendant in the plaintiff's absence and without her consent, to which the plaintiff at once protested, and she also made certain collections on her own behalf.

Held, that the possession of the estate had really remained in the plaintiff, and, there had been a continuing trespass for which the plaintiff was entitled to have an injunction, and it was not necessary for her to institute an action in ejectment against the defendant.

It is not for the Court of Wards to determine whether there has been mal-administration of an estate by an executrix, and on its own determination, take possession thereof on behalf of an infant residuary legatee, before the administration is complete.

It is not essential that the defendants should all actually commit trespass to be liable to the plaintiff; a trespass committed by a subordinate officer under orders from the superior officers is in substance the act of them all and both the subordinate as well as the superior officers are liable to the plaintiff as trespassers. **Ganda Sunderi Chaudhurani v. Nalini Ranjan Raha**, 12 C.W.N. 1065.

WOODROFFE, J.

(2) Manager of Court of Wards, power of, to assert claim of pre-emption—Power to perform necessary ceremonies. See **MAHOMEDAN LAW (PRE-EMPTION)**, No. 1, 35 C. 575.

(3) See **ACT IV OF 1899 (MADRAS)**, No. 1, 4 M.L.T. 321.

(4) Right of—Ss. 18, 43, 55, 57, Act I of 1902 (Madras)—Dispossession of usufructuary mortgagee—Restoration after ward's death—Effect of pro-notes handed to mortgagee not being endorsed. See **MORTGAGE (USUFRUCTUARY)**, No. 4, 4 M.L.T. 341.

Court of Wards, Act.

See **ACT IV OF 1899 (MADRAS)**.

Covenant.

Insertion of personal—in usufructuary mortgage deed to pay mortgage-debt on demand, unaccompanied by hypothecation of property, the subject of mortgage—Covenant does not give a right of sale. See **MORTGAGE (USUFRUCTUARY)**, No. 3, 10 Bom. L.R. 615.

Creditor.

(1) *Right to appropriate payments—Unlawful transactions*

Quaere.—Whether a creditor is entitled to appropriate payments made in respect of unlawful transactions. **Ethirajulu Naidu v. Lakshminarasimham Chetty**, 4 M.L.T. 326.

WHITE, C.J.

Reference —(1905) 1 K.B. 715, D.

(2) —dying leaving will but without executors. See **CONTRACT ACT**, No. 1, 4 M.L.T. 335.

Criminal misappropriation.

(1) —, no case of, where Hindu father entered into a *kuri* transaction for benefit of family and received money, in consideration of his management of the fund, but failed to make payments from collections made, as undertaken by him—Breach of civil duty only—Family property liable for breach. See **HINDU LAW (DEBT)**, No. 4, 17 M.L.J. 613.

(2)—by administrator—No express finding—Effect of general observations in the judgment. See **ADMINISTRATOR**, No. 2, 3 M.L.T. 394.

Crim. Pro. Code.

(1) *Ss. 87 and 88—Forfeiture of ancestral property of a criminal subject to Punjab Customary Law for absconding or committing a crime—Extent of his interest—Necessity—Sale—Right of his reversioner—Full owner defined.*

Held, by majority (Clark, C. J., and Chatterji, J.) that when ancestral property of a person subject to Punjab Customary Law is attached and sold by order of a Criminal Court under the Indian Criminal Law, for his committing a crime or absconding, the sale disposes of the life interest of that person only, but not the right of inheritance, after his death, of his male lineal descendants or of collaterals descended from the original holder of the property.

Per Johnstone, J.—*Contra*. Upon such a sale, the fee-simple of the property is sold and nothing remains for the heir to inherit (a).

Crim. Pro. Code—(Continued).

Per Clark, C. J.—The reversioner has such indefinite interest in the ancestral property that the owner in possession cannot, by his crime or absconding cause that interest to be forfeited.

Per Chatterji, J.—A full owner, in jurisprudence, is a person who has a right over a determinate thing, indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration, or, in other words, having the fullest and freest right of possession, enjoyment and disposition (b).

Principles underlying the existing law must be extended by analogy and other approved methods to new phases of affairs (c). **Sadhu Singh v. Secretary of State for India**, 19 P.W.R. 1908 (F.B.) = 18 P.R. 1908 = 156 P.L.R. 1908.

CLARK, C.J., CHATTERJI AND JOHNSTONE, JJ.

References —(a) 50 P. R. 1893 (F.B.), *It*; 107 P.R. 1887 (F.B.); 116 P.R. 1890 (F.B.), 90 P.R. 1892; 2 P.R. and 18 P.R. 1895 (F.B.); 12 P.R. 1899 (F.B.); 23 P.R. 1900 (Cr.); 34 P.R. 1900; 65 P.R. 1900 (F.B.); 58 P.R. 1906, 41 P.R. 1906; and 10 A. 272, R. (b) 107 P.R. 1887 (F.B.), R. (c) 55 P.R. 1903 (F.B.); 110 P.R. 1906 (F.B.) and 8 Bing. p. 490, R.

(1-a) S. 88—See No. 1, *supra*.

(2) Ss. 96 and 165—Judicial officer proceeding under S. 165 instead of issuing a search warrant under S. 96—Whether he can be said to have acted without jurisdiction. See ACT XVIII OF 1850 (PROTECTION OF JUDICIAL OFFICERS), No. 1, 59 P.W.R. 1908.

(3) *Cr. Pro. Code, S. 145—Specific Relief Act (I of 1877), S. 9—“Dispossessed otherwise than in due course of Law, meaning of”—Crim. Pro. Code (Act V of 1898), S. 145, effect of an order under—If dispossessed within the meaning of S. 9, Act I of 1877,*

The plaintiff sued for recovery of possession of a mica mine under S. 9 of the Specific Relief Act, on the allegation that he was dispossessed by the defendant, therefrom on the 13th February, 1907, in consequence of the final order of the Magistrate of Giridh, passed under S. 145 of the Crim. Pro. Code, on the 11th February, 1907, after the property had been in attachment under the proviso to cl (4) of the section :

Crim. Pro. Code—(Continued).

Held, that, under these circumstances, the plaintiff could not be said to have been dispossessed otherwise than in due course of law, and the plaintiff is, therefore, not entitled to maintain an action under S. 9 of the Specific Relief Act (a).

Although S. 145 of the Crim. Pro. Code, does not expressly authorise the Court to put the successful party into possession, the effect of it is to entitle him to take it.

Per Mookerjee, J.—A matter may be considered to have happened in due course of law, if it is the result and operation of the law, invoked by the ordinary method of any judicial proceeding.

The view that the effect of an order under S. 145 of the Crim. Pro. Code is to entitle the successful party to take possession is consistent with the observations of the Judicial Committee (c). **Leo Moore v. Manoranjan Guha**, 7 C.L.J. 547 = 12 C.W.N. 696.

STEPHEN AND MOOKERJEE, JJ.

References —(a) 26 B. 353; 20 W.R. 12, D. (b) 29 B. 213, *rehed un.* (c) 29 C. 137 (199), 9 W.R. 602, R.

(3-a) S. 145—Suit to recover property, the subject of order under S. 145, Crim. Pro. Code—Limitation—Starting point. See LIMITATION ACT, No. 57, 12 C.W.N. 840.

(4) S. 145, effect of proceedings under, on plaintiff's right to sue for declaration and possession under S. 9, Specific Relief Act. See SPECIFIC RELIEF ACT, No. 1, 5 A.L.J. 297.

(4-a) S. 165—See No. 2, *supra*.

(4-b) S. 195—Sanction to prosecute defendant—Disobedience of injunction—Not amounting to an offence under S. 188, I.P.C.—Civ. Pro. Code, S. 493. See CIV. PRO. CODE, No. 264-A, 14 Bur.L.R. 276.

(5) Ss. 195 (6), 435 and 439—Nature of jurisdiction exercised by every Court, holding proceedings under powers conferred on it by the Crim. Pro. Code, is criminal—Effect of order made under S. 195, Sub-S. 6 of Code by a competent Court—Limit to exercise of power conferred by Sub-S. 6—Revision of order under S. 195, Crim. Pro. Code, made by Civil or Revenue Court in the ordinary course of its business, to be made by High Court.

Crim. Pro. Code—(Continued).

Jurisdiction being conferred on the Courts in British India by a codified adjective law, any jurisdiction conferred upon any Court by the Code of Criminal Procedure must be a criminal jurisdiction, if there is any meaning in the name given to that Code. The Civ. Pro. Code jurisdiction is limited to matters of a civil nature; it is wrong to speak of an order or sanction to prosecute for a criminal offence as a matter of a civil nature. Where a single officer or a single Court is invested with several powers of different natures, the question as to whether that Court is a civil, criminal, or revenue Court must be answered with reference to the nature of the proceedings before it in each case, and, in every proceeding held under the authority of the Crim. Pro. Code, it would be a criminal Court, and it makes no difference whether such jurisdiction is ordinary or exceptional. Though the nature of the ordinary business carried on by a Court offers a convenient basis for its appellation, and for its general administrative control by higher authority, that cannot alter the law and change the nature of a jurisdiction which the Legislature has conferred upon such Court, and, it is that nature upon which depends the judicial control over every proceeding held by any subordinate Court. Each of the superior authorities mentioned, *e.g.*, in S. 195, Crim. Pro. Code, obtains such power of control, not by virtue of his ordinary jurisdiction, but by a special jurisdiction conferred upon him by S. 195, Crim. Pro. Code, without which he would have no authority whatever over any order made under that section. Hence, in exercising the control, each superior tribunal itself becomes, *pro tanto*, a criminal Court within the meaning of S. 195, Crim. Pro. Code (a).

The Legislature never intended that a particular power of superior control, given under a particular section of the adjective law, shall be exercised more than once, and by different Courts, in the same case. Sub-S. 6 of S. 195, Crim. Pro. Code, contemplates one proceeding only, in a single superior Court, after which the power given by it is exhausted, a view supported by the language of Sub-S. 7, cl. (a) of the same section (b).

The powers under Sub-S. 6, S. 195, Crim. Pro. Code, especially in the direction of granting a sanction refused on reasonable and valid grounds, should be most sparingly used (c).

Crim. Pro. Code—(Continued).

In a suit brought in 1903 against the appellant, he had made a statement, and, in a suit brought in 1906 against him, which was dismissed as false and malicious, he made a statement alleged to be contradictory to that made in 1903. An application for sanction to prosecute the appellant for perjury in respect of the alleged contradictions in the statements of 1903 and 1906 was dismissed by the Court of the first instance, but the District Judge accorded the sanction asked for with reference to the discrepancy between the statements. *Held*, that the application should be dealt with under S. 439 of the Crim. Pro. Code, and not under S. 622 of the Civ. Pro. Code, 1882. **Shankar Rao v. Shaik Daud**, 4 N.L.R. 140.

STANYON, A.J.C.

References—(a) 5 P.R. 1908 (Or.), 31 C. 42, *relied on*. (b) 17 C.P.L.R. 107, R. (c) 22 W.R. 11 (Cr.) and 1 C.W.N. 529, F.

(6) Ss. 195 (6) and 439—*Power of Chief Court to interfere on its criminal revision side with an order of sanction by a District Court.*

A District Court sanctioned the prosecution of R, for offences under Ss. 193, 196 and 471 of the Penal Code, R, applied to the Chief Court of Lower Burma, on its criminal revision side, to have the sanction revoked under the power conferred by S. 439 of the Crim. Pro. Code. *Held*, the Chief Court had not the power conferred on it, to interfere with the proceedings of a Court which is not *qua* the Crim. Pro. Code, subordinate to it. **Ramzan Ali v. Oporno Charan Chowdry**, 4 L.B.R. 138.

IRWIN, J.

References—26 A. 1, *Diss.*, 26 M. 139 and 8 C.W.N. 73, F.

(6-a) S. 435—See No. 5, *supra*.

(6-b) S. 439—See Nos. 5 and 6, *supra*.

(7) S. 476—*Power of interference of High Court exercising civil jurisdiction—Civ. Pro. Code, S. 622—S. 15, Charter Act—Considerations to be had regard to in exercising revisional jurisdiction of High Court—Stay of criminal proceedings pending a civil appeal—Conditions under which stay can be made.*

In a probate case before a District Judge, the present petitioners, among others, opposed the grant of probate. The District Judge, after

Crim. Pro. Code—(Continued).

hearing the evidence of both the parties, held that the will propounded had been duly executed and that the petitioners had conspired to prevent the grant of probate and had given false evidence in furtherance of that conspiracy. He, thereupon, instituted proceedings against the petitioners under S. 476, Crim. Pro. Code, and directed their prosecution under S. 193, I.P.C., in respect of the false statements made by them.

Held that it was doubtful whether the High Court, exercising civil jurisdiction, could stay the criminal proceedings, that no case had been made out for the interference of the High Court, under S. 622, Civ. Pro. Code, and that the provisions of S. 15 of the Charter Act did not appear to give the High Court power to interfere in the case (a).

Held, also, that the High Court must have regard to the nature of the revisional jurisdiction and must not, in a case arising under S. 476, any more than in any other case, allow, what would virtually be, an appeal from the order of the Court below (b).

Held, further, that where the Court below, being asked to postpone passing orders, under S. 476, Crim. Pro. Code, until the disposal of the appeal to the High Court, refused to do so, but thought it fit, in the interests of justice, to take immediate action, the High Court ought not to stay proceedings, merely on the ground that a civil appeal is pending before it (c). **Hem Chandra Ray v. Atal Behari Ray**, 35 C. 909

RAMPINI, C.J., AND RYVES, J.

References :—(a) 23 C. 610, F, (b) 23 A 249, followed in principle, (c) 26 B 785, F

(8) S. 476—Offence committed before one Munsiff—prosecution ordered by another—Validity. See SANCTION TO PROSECUTE, No. 1, 95 C. 114.

(9) S. 476—Power of Court to order prosecution under S. 476—Execution proceedings—Judicial proceedings. See SANCTION TO PROSECUTE, No. 2, 95 C. 193.

(10) S. 488—Right of an illegitimate child to be maintained by its putative father—Refusal of maintenance by Magistrate—Suit to enforce payment of maintenance.

A Hindu woman applied, under this section, to a Magistrate for maintenance of her child alleged to have been begotten by the defendant. The Magistrate refused maintenance. Hence

Crim. Pro. Code—(Concluded).

this suit in a Civil Court. The defence contended that the suit was not maintainable, and that the order of the Magistrate was conclusive. *Held*, the Crim. Pro. Code does not bar a suit in the Civil Court. It simply enables a Magistrate to pass an order for maintenance under a given state of circumstances. Further S. 11 of the Civ. Pro. Code allows a civil suit in respect of a matter of a civil nature unless a suit is barred by special enactment. there being no enactment barring the cognizance of a suit, it was maintainable. If the Magistrate had passed an order, no suit might lie for setting aside the order. That is not this case (a).

It was contended, also, that the Hindu Law does not authorize maintenance being granted to illegitimate children (b). *Held*, apart from the Hindu Law, maintenance is awardable in such cases, on general principles. The defendant having begotten the child, he was bound to provide for its maintenance. **Ghana Kanta Mohanta v Gereli**, 32 C. 479 = 13 C.W.N. 150.

GHOSE AND PARHITER, JJ.

References. (a) 20 W.R. (Cr.), 58 and 18 A. 29, *Distd.* (b) 7 M.L.A. 184 = W.R. 132 (P.C.), *Refd* to

Customs.

1.—GENERAL.

2.—PUNJAB.

—1—(General).

(1) *Finding in favour of existence of custom based upon insufficient evidence—Second appeal—Practice.*

Held, that where a question arises as to the existence or non-existence of a particular custom and the lower appellate Court has acted upon illegal evidence or on evidence legally insufficient to establish an alleged custom, the question is one of law, and the High Court is entitled in second appeal to consider whether the finding is based upon sufficient evidence. **Ram Bilas v. Lal Bahadur**, A.W.N. (1908), 112 = 5 A L.J. 456 = 4 M.L.T. 169 = 80 A. 311.

STANLEY, C.J., BURKITT AND AIKMAN, JJ.

References :—(a) 28 A 698, R and 27 A. 338, *approved*.

(2) Where custom is proved to exist, it supercedes the general law, which regulates outside the custom. See MAHOMEDAN LAW (GENERAL), No. 1, 11 O.C. 1.

Customs (1.—General)—(Concluded).

(2-a) When the existence of a custom is generally known and judicially recognised it is not necessary to assert and prove it. See **MAHOMEDAN LAW (PRE-EMPTION)**, No. 1, 35 C 575.

(3)—securing to co-sharers, right of pre-emption at fixed price per unit without reference to actual price by stranger—Enforceability of such custom. See **PRE-EMPTION**, No. 23, A.W.N. (1908), 98.

(4)—against marriage of *Rajput* with *Khat-rani* woman, whether existing and established—Burden of proving it. See **HINDU LAW (MARRIAGE)**, No. 1, 64 P.L.R. 1908.

(5)—of exclusive worship in temple valid though unsound in doctrine. See **HINDU TEMPLE**, No. 1, 12 C.W.N. 946.

(6) Nature of proof required to prove custom, relied on by upper riparian owner, claiming to irrigate his land from river flowing through it. See **EASEMENTS**, No. 5, 35 C. 851.

(7)—governing *mutts* in the matter of their succession—Proof of custom. See **RELIGIOUS ENDOWMENTS**, No. 7, 8 C.L.J. 499.

(8) Admitting application as further appeal where question of, involved. See **APPEAL (GENERAL)**, No. 4-a, 136 P.R. 1903 (Note)

(9) Debutter—Hereditary shebaitship, validity of disposal of, by will. See **RELIGIOUS ENDOWMENTS**, No. 2, 12 C.W.N. 323.

—2.—(Punjab).

- 1.—ADOPTION.
- 2.—ALIENATION.
- 3.—GIFT.
- 4.—INHERITANCE AND SUCCESSION.
- 5.—MARRIAGE.
- 6.—PRE-EMPTION.
- 7.—SHAMILAT LAND.
- 8.—WILLS.

—1.—Adoption

(1) *Custom—Adoption—Inheritance—Rohtak, Riway-i-am—Unchaste widow entitled to succeed—Adopted son's right of collateral succession.*

Held, that, in the absence of proof of any custom to the contrary, a widow by not remaining chaste does not forfeit her interest in the property left by her deceased husband (a).

Customs (2.—Punjab)—(Continued).**—1.—Adoption—(Continued).**

Held, also, that, in Rohtak District, in common with the portion of the old Delhi Territory, adoption, where effected, is of a formal nature, and not the mere customary appointment of an heir as is usually met with in the Punjab proper; and the adopted son merges in his new family and there is no limitation of his right of collateral succession. **Mussammat Dhohan and Sohan Lal v. Sohan**, 3 P.W.R. 1908.

ROBERTSON AND KENSINGTON, JJ.

Reference.—(a) 107 P.R. 1888, F.

(2) *Adoption of distant agnate—"Jats" of Amritsar District.*

Held, that according to custom prevailing among *Jats* of Amritsar District, adoption by a childless proprietor of a distant agnate in the presence of nearer ones is not invalid. **Nidhana v. Shaman**, 7 P.L.R. 1907—43 P.W.R. 1907—10 P.R. 1908.

ROBERTSON AND LAL CHAND, JJ.

(3) *Adoption by Jats with ceremonies—Adopted son's right to succeed to the property of his adoptive father's father when the adoptive father dies in the life-time of his father.*

In the case of a formal adoption with customary ceremonies, the adopted son is entitled, even among *Jats*, to succeed to the property of his adoptive father's father, though his adoptive father died in the life-time of his father and did not inherit property from him

Quaere.—Whether an appointed heir is so entitled? **Bhagwan Singh v. Gurdial Singh**, 80 P.L.R. 1906—4 P.W.R. 1908

CHATTERJI AND JOHNSTONE, JJ.

(4) *Custom—Brahmins of Dialpur, Tahsil Kasur—Adoption of wife's brother's son—Right of collateral of eighth degree to question the validity of adoption—Burden of proof.*

Brahmins of Dialpur, Tahsil Kasur, Lahore District, who are full proprietors with share of Shamilat and had settled with the founder, and agreed to the same conditions as the *Jats*, as to the alienation of land and as to the non-succession of daughter, are, in matters of adoption, governed by custom and not by Hindu Law (a).

Held that the defendant on whom lay the burden of proving that the collaterals of the eighth degree were not entitled to challenge the validity of adoption, had not discharged that burden (b).

Customs (2.—Punjab) —(Continued).**—1.—Adoption—(Concluded).**

Held also that the onus of proving that an adoption of wife's brother's son was valid by custom in the above community lay on the defendant and that he had failed to discharge the burden (c). **Ram Chand v. Thakar Das**, 94 P.R. 1907 = 29 P.L.R. 1908 = 123 P.W.R. 1907

CLARK, C.J.

References —(a) 103 P.R. 1902, *D.* (b) 35 P.R. 1906, *F'*; 93 P.R. 1906, *D.* (c) 94 P.R. 1893; 3 P.R. 1901, *D.*; 75 P.R. 1892, *R.*

(5) *Sekhu Jats of Tahsil Dasha, Sialkot District—Adoption of daughter's son—burden of proof.*

There is no custom among the Sekhu Jats, empowering a sonless proprietor to adopt his daughter's son in the presence of near collaterals. The burden of proof of the validity of such an adoption lies upon those setting it up. **Mohammed Din v. Jawahir**, 69 P.R. 1907 = 170 P.L.R. 1908.

ROBERTSON AND SHAH DIN, JJ.

References —81 P.R. 1900; 29 P.R. 1904, *R.*

(6)—whether govern Sarsut Brahmins of Gopalpura village, Amritsar District. See CIV. PRO. CODE, No. 9, 95 P.L.R. 1908.

—2.—Alienation.

(1) *Rajputs acquiring out of savings from Government service urban immoveable property—Powers of alienation—Sale of ancestral land to pay off debt really due—Onus of proving immoral nature of debts.*

The presumption in favour of a restricted power of alienation of ancestral immoveable property, as laid down in *Gujar v. Sham Das* (107 P.R. 1887) (F.B.) applies only to agriculturists by occupation and members of village communities. But, where a family, though belonging to an agricultural tribe, has altogether drifted away from agriculture as its main occupation and has settled for good in urban life and adopts trade, industry or service, as its principal occupation and means and source of livelihood, no initial presumption would exist or apply that the power to alienate ancestral immoveable property by the members of such family is necessarily restricted.

The rule applies to property connected with ancestral lands and not to house property altogether unconnected, which is acquired in a town or a city as a means of investment (a).

Customs (2.—Punjab)—(Continued).**—2.—Alienation—(Continued).**

A Rajput is not necessarily an agriculturist, nor is he governed by customs of agricultural tribes as a matter of necessity.

Where a Rajput acquired urban immoveable property out of savings made while in Government service and settled to urban life permanently, *held*, that his descendants were not governed by customary law of agriculturists as to matters relating to power of alienation of ancestral immoveable property, merely because they were Rajputs. The test in such cases would be not merely caste, but permanent and hereditary occupation as well (b).

Where ancestral property is sold to pay debts really due, the alienation made to pay such debts is a necessity. The onus is on the person who seeks to have the alienation set aside that the debts were really incurred for immoral purposes and in reckless extravagance (c). **Muhammad Hayat Khan v. Sandhe Khan**, 55 P.R. 1908 = 105 P.W.R. 1908.

JOHNSTONE AND LAL CHAND, JJ.

References —(a) 107 P.R. 1887 (F.B.), *Expl.*; 73 P.R. 1895 (F.B.), *F'*; 58 P.R. 1905; 93 P.R. 1885; 12 P.R. 1892 (F.B.); 65 P.R. 1900, 120 P.R. 1893; 14 C. 717, 14 B. 320, *R.*; (b) 23 P.R. 1897, 21 P.R. 1896, *R.* and (c) 65 P.R. 1900 (F.B.), *F.*

(2) *Arains of mauza Agwan Ladhai, tahsil Jagraon, Ludhiana District—Power of male proprietor to make gifts of ancestral immoveable property with the consent of childless son to daughter—Right of reversioners to contest the alienation.*

An Arain of Mauza Agwan Ladhai, tahsil Jagraon, Ludhiana District may validly make a gift of ancestral immoveable property to his daughter, with the consent of his son and next heir who is himself childless. Remote reversioners cannot question such alienation. **Shadi v. Khewni**, 58 P.R. 1908 = 117 P.W.R. 1908 = 162 P.L.R. 1908.

RATTIGAN AND SHAH DIN, JJ.

Reference —7 P.R. 1905, *R.*

(3) *Alienation of ancestral property—Right of son belonging to Brahmin family at Gopalpur, Amritsar District, to question an alienation by father—Hindu Law.*

Brahmins of the village of Gopalpur in the Amritsar District are bound by Hindu Law and not by agricultural custom as regards

Customs (2.—Punjab)—(Continued).**—2.—Alienation—(Continued).**

alienation of ancestral property. Therefore, a son, after attaining majority is not competent to have set aside an alienation made by his father along with his uncles on the ground of absence of necessity, if it has not been incurred for immoral purposes. **Lachman Das v. Pahia Mal**, 59 P.R. 1908=121 P.W.R. 1908

CHATTERJI AND ROBERTSON, JJ.

(4)—*Alienation—Competency of reversioners related to a childless proprietor in 9th degree to contest alienations made to reversioners one degree further removed in Mauza Timmawal Tahsil, and District Amritsar—Effect of delay in suing—Necessity—Res judicata—S. 13 of the Code of Civ. Pro., 1882.*

Held, that, the reversioners related to a childless Jat proprietor of Amritsar District in 9th degree can successfully contest the alienations made by him without necessity in favour of the other reversioners one degree further removed.

Held, also, that when reversioners have made great delay in suing to protect their reversionary rights, justice requires that Courts should not seek to narrowly scrutinize the acts of the alienor, but where the deed of transfer is in itself silent as to the detail, and there is no satisfactory proof, of necessity, the reversioners cannot be deprived of their just rights on the ground of mere delay.

Held, also, that the dismissal of a previous declaratory suit, brought by some of the reversioners on the ground that they are so distantly related to the alienor that they have no *locus standi* to object to his alienation, does not bar the other reversioners, not party to the former litigation, from maintaining another suit to challenge the alienations.

Held, further, that a few of the reversioners cannot claim the whole of the property left by the alienor in the hands of the alienees, but can get it only up to the extent of their own share in it. **Hira Singh v. Gulab Singh**, 36 P.W.R. 1908=111 P.L.R. 1908.

CHATTERJI AND ROBERTSON, JJ.

(5) *Gilani Sayads of Mauza Masania, Tahsil Batala, District Gurdaspur—Alienation by sonless proprietor, reversioner's right to question—Alienation for religious purposes.*

Customs (2.—Punjab)—(Continued).**—2.—Alienation—(Continued).**

The Gilani Sayads of Mauza Masania being agriculturists, and having adopted agricultural customs in matters relating to succession and alienation, the initial presumption against an unrestricted power of alienation is applicable to them. It is not sufficient to rebut such presumption that a number of alienations were effected by members of the tribe to which the parties belonged, unless it is further proved that the alienation effected were such as are unauthorised by the customary law. But a member of the tribe is justified in incurring expenditure for a religious ceremony such as the *aqqa* ceremony of his son and the marriage of his first cousin, each item being a necessity, and he is, therefore, justified in alienating a small portion of his ancestral land for such purposes. **Shah Nawaz v. Azmat Ali**, 40 P.R. 1907=10 P.L.R. 1908.

ROBERTSON AND LAL CHAND, JJ.

Reference—21 P.R. 1896, R.

(6) *Mode of calculating degree of relationship—Alienation by widow—Consent of nearer reversioners—Right of remote reversioners to contest the alienation—Presence of daughters, effect of—*

In the Banu district, *tahsil* Isa Khel, the mode of computing degrees of relationship is from the collateral to the common ancestor, both being counted.

The fact that plaintiff is not the nearest reversioner will not be a bar to his maintaining a suit for a declaration that a sale or immovable property effected by the widow should not affect his reversionary rights, and where a nearer reversioner consents to the alienation, or stands aside and refuses to sue, a more remote reversioner can come in and contest the validity of the alienation (a).

The degree of relationship will no doubt be considered, and where the suit is purely speculative, and the plaintiff has a very remote chance of inheriting, the Courts will, in their discretion, refuse him the relief.

The reversioner of the sixth degree sued for a declaration that an alienation of immovable property by the widow of a sonless proprietor should not affect their reversionary rights. There were reversioners of the fifth and lesser degrees and daughters of the deceased in existence. It was found, that, by the custom of

Customs (2.—Punjab)—(Continued).**—2.—Alienation—(Continued).**

the village, the daughters of the deceased succeeded in the absence of collaterals of the fifth degree.

Held, as it was highly improbable that the daughters would interpose to contest the alienation by their mother, with whom they were living until their marriage, and as it was by no means certain that the daughters would ever succeed as heirs, as there were several collaterals of the fifth and lesser degrees in existence, that the plaintiffs were entitled to sue. **Girdhari Ram v Faizullah Khan**, 48 P.R. 1908 = 98 P.W.R. 1908 = 166 P.L.R. 1908.

ROBERTSON AND CHITTY, JJ.

References (a) 7 P.R. 1893; 84 P.R. 1898 (F.B.), F

(7) *Alienation by childless male proprietor—Gift to daughter's son and son's daughter—Araons of Nakodar Tahsil*

Held, that by custom prevailing among Araons of the Nakodar Tahsil of Jullundur District, a gift of ancestral property by a sonless proprietor in favour of his daughter's son or son's daughter is valid **Pala v. Nur Muhammad**, 115 P.L.R. 1908.

LAL CHAND, J.

(8) *Alienation of ancestral property by issueless proprietor—Nearest reversioner estopped by acquiescence from questioning alienation—Such reversioner's son's right to impeach alienation for want of necessity.*

Where a childless male proprietor sold ancestral immovable property, the fact that the next reversioner challenged the sale, not for want of necessity, but on the ground that he was ready to pre-empt, which he never did, and his omission at mutations to attack the sale as unnecessary, are circumstances proving that the sale was acquiesced in as a valid sale, and such reversioner's son is, therefore, estopped from suing for possession of the property sold, on the ground that the sale was not effected for necessity. **Lakha Singh v Jota Singh**, 35 P.R. 1907 = 14 P.L.R. 1908.

LAL CHAND, J.

References.—15 P.R. 1902, 42 P.R. 1902, R.

(9) *Bedi Khatries of Calewal, Tahsil Dasuha, District Hoshiarpur—Alienation by sonless proprietor—Reversioner's right to impeach it—Onus.*

Customs (2.—Punjab)—(Continued).**—2.—Alienation—(Continued).**

It cannot be said that, in the matter of alienation, any custom can as yet have been adopted or followed by the Bedi Khatries of Calewal, in regard to alienation of ancestral estate. The burden of proof of a special custom is on the reversioner, who asserts it **Nisai Chand v. Bhagwan Singh**, 33 P.R. 1907 = 9 P.L.R. 1908.

JOHNSTONE AND RATTIGAN, JJ.

References —21 P.R. 1891, 122 P.R. 1893, 21 P.R. 1896, R.

(10) *Alienation by childless male proprietor—Acquiescence by father of plaintiff.*

A childless male proprietor sold his ancestral property by two sales in 1897 and 1900. The plaintiff, his nephew, sued to set aside the sale in 1903. It appeared that the plaintiff's father took no steps to challenge the validity of the sale and he did not die till about a year after the second sale.

Held, that the suit must be dismissed, for the plaintiff must be held bound by the acquiescence of his father. **Muhammadi Begam v. Faiz Muhammad Khan**, 12 P.L.R. 1908 = 35 P.R. 1907 (note).

CHATTERJI AND RATTIGAN, JJ.

(11) *Alienation—Gift by childless proprietor of ancestral property—Araons of Jullundur District.*

A childless Araon, in the Jullundur District, has not the absolute and uncontrolled right to give away ancestral land to strangers, and non-relations to the prejudice of his collateral relations, though his powers of disposition are undoubtedly large. **Barkat Ali v. Jhandu**, 127 P.R. 1907 = 81 P.W.R. 1907 = 59 P.L.R. 1906.

CHATTERJI AND JOHNSTONE, JJ.

(12) *Hindu Bhat Jats of Tahsil Raya, Sialkot District—Alienation by sonless proprietor—Right of reversioners of 8th degree to contest alienation.*

Among the Hindu Bhat Jats of Tahsil Raya, an alienation of ancestral land made by a childless proprietor cannot be contested by his collaterals in the 8th degree. **Hira v. Karam Kaur**, 23 P.R. 1907 = 35 P.L.R. 1908 = 130 P.W.R. 1907.

ROBERTSON AND SHAH DIN, JJ.

References.—93 P.R. 1906, 126 P.R. 1890, R.

Customs 2.—(Punjab)—(Continued).**—2.—Alienation—(Continued).**

(13) **Gift or bequest by sonless proprietor to daughter, effect of—Bukhari Sayads of Gujrat District—Khanadamad.*

Under agricultural custom, among Bukhari Sayads of Gujrat District, daughters, in the presence of near collaterals, cannot take as full proprietors, but can merely hold the estate till their death or marriage. But, when a gift is made to daughters by a sonless proprietor, it is taken to be a gift for the benefit of the daughters and their issue.

A *Khanadamad* is a son-in-law who has married a girl of the family in her father's lifetime and has taken up his abode in the ancestral house. The original idea of the institution was that the son-in-law, by coming and residing with the girl's father, would help him in cultivation and management of the estate and so earn a right something like that of son. A testator cannot nominate as *Khanadamads* the future husbands of his daughters, who have not, during the testator's lifetime, taken their abode in the ancestral house. **Hayat Saha v. Fazal Begam**, 70 P.R. 1908 = 127 P.W.R. 1908.

CHATTERJI AND JOHNSTONE, JJ.

(14) *Julahas of Pajawa, Tahsil Fazilka, whether governed by agricultural custom.*

Only in the case of agricultural tribes, such as Jats and Rajputs, Gujars and Arains, a presumption in favour of the adoption of agricultural custom restricting the power of alienation of agricultural land arises. *Held*, that Julahas of Pajawa, Tahsil Fazilka were not Rajputs, and, in the origin and history of the village, there was no sufficient ground for holding that the Julahas were governed by Punjab agricultural custom. **Habib v. Fattu**, 69 P.R. 1908 = 125 P.W.R. 1908.

CHATTERJI AND JOHNSTONE, JJ.

Reference :—87 P.R. 1907, D.

(15) **Gift by widow of ancestral immoveable property to her daughter and daughter's son—Gil Jats of the Amritsar District—Right of collaterals of sixth degree to inherit before the daughter and daughter's son.*

Gil Jats of the Amritsar District are admittedly governed by custom and the widow of a deceased proprietor cannot alienate ancestral immoveable property, except for necessity. Collaterals in the sixth degree can set aside the alienations made by the widow in favour of

Customs (2.—Punjab)—(Continued).**—2.—Alienation—(Continued).**

her daughter or daughter's son and are entitled to inherit before them. **Ram Kaur v. Bela Singh**, 67 P.R. 1908 = 112 P.W.R. 1908.

CLARK, C.J. AND REID, J.

References :—126 P.R. 1890, 101 P.R. 1881; 75 P.R. 1898; 2 P.R. 1901, 79 P.R. 1891; 36 P.R. 1905; 93 P.R. 1906; 5 P.R. 1908 and 11 P.R. 1908, R.

(16) *Adopted son alienating adoptive father's property—Right of sons born before the adoption of their father to contest the alienation*

Sons born before the adoption of their father cannot contest an alienation by their father of property inherited by him from his adoptive father, when the latter belongs to a different tribe. The right to contest alienations, as laid down in 107 P.R. 1887, is based on the theory that all the persons, who are descended in the male line from the original owner of the property, have a sort of "residuary interest" in it, or, in other words, that the property, in a sense, belongs to all the male descendants in the male line of the original owner. Where the father and the adopted son are of different tribes and in no way related to each other the theory will not apply. **Tulsi v. Ram Rakha**, 66 P.R. 1908 = 110 P.W.R. 1908.

KENSINGTON AND JOHNSTONE, JJ.

References :—107 P.R. 1887 and 25 P.R. 1901, D.

(17) —*by sonless proprietor—Assent by reversioner after decree in his favour, validity of.*

Where a sonless proprietor alienates ancestral land, it is not necessary that the assent of the reversioner should be obtained at the time of the alienation; such assent may be obtained at a later period. The assent may be withheld at first and given later on. The reversioner may even sue and withdraw from the suit. He may also change his mind and give his assent even after the suit to contest the alienation has ended in a decree in his favour. Such assent is binding on his sons and on more remote reversioners than himself. **Shib Ram v. Shib Singh**, 78 P.R. 1908 = 138 P.W.R. 1908.

CLARK, C.J., AND CHEVIS, J.

References :—66 P.R. 1897 (F.B.), D. and 59 P.R. 1904, R.

Customs (2.—Punjab)—(Continued).**—2.—Alienation—(Continued).**

(18) *Alienation—Custom—Hindu Law—Suit by son to contest alienation of ancestral property by his father—Definition of ancestral property—Onus of proving ancestral property on son—Ancestral property mixed up with self-acquired.*

Held, that the onus of proving that certain property is ancestral lies on the son who contests its alienation by his father on the ground of its being ancestral.

Held, also, that, unless the son proves that the property has come to his father by descent from a lenial male ancestor in the male line through whom the son also in the like manner claims, it is not to be deemed ancestral in Hindu Law.

Held, further, that when the ancestral property is so mixed up with the self-acquired that it is impossible to differentiate between the two, the whole of it is to be regarded as self-acquired. **Attar Singh v. Thakar Singh**, 128 P.W.R. 1908 (P.C.).

LORDE ROBERTSON, ATKINSON, COLLINS, SIR ANDREW SCOBLE, AND SIR ARTHUR WILSON

(19) *Khinger Jats, Chakwal Tahsil, Jhelum District—Gift of ancestral land by sonless proprietor to his sister's son and Khanadamad and to his daughter's son.*

Amongst Khinger Jats of Chakwal Tahsil, a sonless proprietor can make a valid gift of his ancestral land to his sister's son and Khanadamad and to his daughter's son in the presence of male collaterals. **Fazal v. Hayat Ali**, 29 P.R. 1907=22 P.L.R. 1908=144 P.W.R. 1907.

CHATTERJI AND RATTIGAN, JJ.

References —22 P.R. 1904; 85 P.R. 1904; 71 P.R. 1904; 33 P.R. 1905; 62 P.R. 1906, R.

(20) *Mair Rajaputs of Chakwal tahsil, Jhelum District—Gift by a childless proprietor of his entire estate to two of his grand-nephews in presence of other nephews and grand-nephews.—Valid by custom.*

Among the Mair Rajaputs of the Chakwal tahsil, Jhelum District, a childless proprietor is competent by custom to transfer by gift the whole of his estate in favour of two of his grand-nephews in the presence of other nephews and grand-nephews (a). **Fazl Bakhsh v. Jahan Shah**, 96 P.R. 1907=28 P.L.R. 1908.

RATTIGAN AND CHITTY, JJ.

References :—(a) 1109 P.R. 1892, F.; 22 P.R. 1904; 48 P.R. 1908 (F.B.), R.

Customs (2.—Punjab)—(Continued).**—2.—Alienation—(Continued).**

(21) *Sayads of Gurgaon District—Suit for declaration by sister of last male proprietor and his son to contest alienation of ancestral property by daughter of such proprietor—Right of female prospective heir to contest alienation.*

When a female with a right to succeed to the estate held by another female seeks to control an alienation by the latter, she must first prove two things: (a) that she is in fact entitled to succeed on the death of the alienor; (b) that the alienor is holding as a female with only a limited estate resembling that of a widow. When a female is holding an estate on the same tenure as a male proprietor or male sonless proprietor, another female is not competent to contest her alienations.

The parties to this suit were *Sayads* of Gurgaon District. The defendant succeeded to the property of her father in default of male heirs and alienated portions of it. The plaintiffs, who were a sister of the father of the defendant and her son, sought for a declaration that the alienations shall not affect their rights after the death of the defendant.

Held that, as the alienor had succeeded by custom to the ancestral landed property of her deceased father as a full owner, the plaintiffs had no *locus standi* to maintain the suit. **Maqaud-ul-Nissa v. Kaniz Zohra**, 135 P.R. 1908.

ROBERTSON AND LAL CHAND, JJ.

References.—61 P.R. 1906; 90 P.R. 1894, 74 P.R. 1899; 16 P.R. 1908; 90 P.R. 1903; 19 P.R. 1906; 72 P.R. 1906, R.

(22) *Phapra Moghals of Jhelum District—Whether person having living son can alienate part of ancestral property to cousin—Validity of such gift.*

Among the Phapra Moghals of the Jhelum District, whatever may be the powers of a sonless proprietor, a person, who has a son living, cannot make a valid gift of a part of his ancestral property, to the detriment of that son, in favour of a cousin. **Fazal Muhammad v. Shahbaz Khan**, 126 P.R. 1908.

RATTIGAN AND CHITTY, JJ.

Reference :—71 P.R. 1904, R.

(23) *Brahmins owning land in Rawalpindi Tahsil—Alienation of land—Law governing such alienation, whether custom or Hindu Law.*

Customs (2.—Punjab)—(Continued).**—2.—Alienation—(Concluded).**

Held that, in matters of succession and alienation regarding ancestral property, the Brahmins of Village Adiala in Rawalpindi Tahsil who owned land were governed by Hindu Law and not by custom. **Hira Nand v. Hari Chand**, 125 P.R. 1908.

RATTIGAN AND SHAH DIN, JJ

References —**Hira Nand v. Lachman Das**, decided on the 29th August, 1890, **Mukha Singh v. Mukha Singh**, Civil Appeal No. 92 of 1901, decided on 24th February, 1905 and **Dev Ditta Singh v. Mussamat Dharayth**, Civil Appeal No 1089 of 1907, decided on 30th January, 1907, D., 110 P.R. 1906 (F.B.), *relied on*.

(24) Non-agriculturist, being leader in village, attesting village *wajib-ul-ars*—No acknowledgment on his part that his own family followed that custom which he attested. See HINDU LAW (ALIENATION), No. 10, 158 P.L.R. 1908.

(25) *Awans* of Pind Dadan Khan tahsil of Jhelum District—Daughter of sonless proprietor inheriting father's non-ancestral property—Whether such daughter, in presence of father's collaterals of the ninth degree, has a limited or absolute power of disposal. See CUSTOMS (PUNJAB) - INHERITANCE AND SUCCESSION, No. 13, 121 P.R. 1908.

(26) Member of agricultural tribe, whether entitled to give his land to daughter married in another district. See ACT XIII OF 1900 (PUNJAB LAND ALIENATION), No. 2-A, 8 P.W.R. 1908 (Rev.)

(27) Law governing alienation by Brahmins of Mouza Sambaka, Ambala District—Alienation by widow—Suit by distant reversioner. See HINDI LAW (ALIENATION), No 14, 149 P.R. 1908.

—3.—Gift.

See [CUSTOMS (PUNJAB)—ALIENATION], *supra*.

—4.—Inheritance and Succession.

(1) *Koreshis of Gulhana, Rawalpindi District, Gujar Khan Tahsil belonging to family of Pirs—Whether governed by Mahomedan Law or by custom.*

The Koreshis of Gulhana in the Rawalpindi District, Gujar Khan Tahsil, who belong to a family of Pirs who practise Pir Muridi and live, to some extent at any rate, on offerings, are governed in matters of inheritance by Maho-

Customs (2.—Punjab)—(Continued).**—4.—Inheritance and Succession—(Ctd.).**

medan Law, and not by custom. **Mussamat Bakht Bano v. Chiragh Shah**, 45 P.R. 1908 = 93 P.W.R. 1908.

Reference .—110 P.R. (1906) (F.B.), *R. and F.*

(2) *Mahomedan Law—Inheritance—Gulfrush city Arains of Lahore and Amritsar governed by Mahomedan Law—Construction of deed of gift.*

Held, that, *Gulfrush*, i.e., flower selling city Arains of Lahore and Amritsar are governed by Mahomedan Law and not by customs of the Punjab agriculturists, in matters of inheritance and alienation.

Held, also, that where a deed of gift begins with numerous conditions limiting the rights of the donee, the first being that the donee would keep the property for life, but it ends by declaring that the donor or his heirs would have no claim or title to the gifted property, it is a deed of gift conferring absolute ownership on the donee (a).

Held, further, that as the deed of gift in dispute was executed in 1870 and no effort was made in time to challenge it, the claim was also barred by limitation. **Mussamat Talia Bibi v. Mehr Bakhsh**, 72 P.W.R. 1908.

CHATTERJI AND KENSINGTON JJ.

Reference — (a) 25 P.R. 1882, *referred to*.

(3) *Rajputs of Ludhiana District—Succession to unpaid dower.*

The Mahomedan Rajputs of the Ludhiana District, who are governed by the general rules of agricultural custom of the province in matters of succession generally, are governed by Mahomedan Law as regards succession to unpaid dower of a deceased female. **Faqir Muhammad v. Miran Baksh**, 43 P.R. 1908 = 90 P.W.R. 1908 = 188 P.L.R. 1908.

REID, J.

(4) *Inheritance—Sister's right of inheritance to a deceased male proprietor—Nature of her right.*

When a proprietor, following the customary law of the Punjab, dies leaving no sons but a sister, the sister should, for the purposes of inheritance, be regarded as only the sister of that proprietor, and not as a daughter of his father.

Customs (2—Punjab)—(Continued).**—4.—Inheritance and Succession—(Contd.)**

Hamira v. Ram Singh, 184 P.R. 1907 (F.B.) = 74 P.L.R. 1908 = 85 P.W.R. 1907.

CLARK, C.J., AND CHATTERJI AND JOHNSTONE, JJ.

References:—108 P.R. 1900; 110 P.R. 1906 (F.B.), *Diss.*; 117 P.R. 1888, 171 P.R. 1888; 46 P.R. 1891 (F.B.), *D*; 184 P.R. 1907 (Note), *F*.

(5) Inheritance—Right of sister to inherit—Collaterals—Burden of proof.

When a man, without brothers, dies sonless in a tribe in which the daughter excludes the collaterals, it cannot be held that his sister has the same rights as a daughter and also exclude collaterals. The burden of proof lies upon her to prove a special custom in her favour, when she is contesting, with ascertained collaterals, however distant, the right to inherit the property of the deceased. **Saidan Bibi v. Fazal Shah**, 184 P.R. 1907 (Note) = 85 P.W.R. 1907 (App.) = 74 P.L.R. 1908 (Note).

CHATTERJI AND JOHNSTONE, JJ.

References:—71 P.R. 1892; 24 P.R. 1905; 41 P.R. 1895; 46 P.R. 1895; 4 P.R. 1891 (F.B.); 12 P.R. 1892 (F.B.); 171 P.R. 1888; 140 P.R. 1893; 172 P.R. 1899, *R*, and *D*.

(6) Custom—Inheritance—Natural son, dying issueless, born after adopted son—Right of adopted son to succeed and also to natural son's share.

Held, that, by custom, an adopted son succeeds to the share of a natural son born to the adopter after the adoption, who dies without issue, but not to the share of his father's collaterals. **Jowala Singh v. Lal Singh**, 2 P.W.R. 1908.

REID, C.J., AND KENSINGTON, J.

References:—97 P.R. 1879, 9 P.R. 1880; 34 P.R. 1883 (F.B.), 14 P.R. 1884; 84 P.R. 1887; 181 P.R. 1889; 107 P.R. 1891; 12 P.R. 1892 (F.B.), 56 and 111 P.R. 1893; 61 and 138 P.R. 1894, 29, 43 (F.B.), 53 P.R. 1895; 18 P.R. 1900, *D*; 4 P.R. 1891 (F.B.), *R*.

(7) Gujars of Gujarat—Right of son-in-law of Khanadamad to inherit.

Among Gujars of Gujarat District, the son-in-law of a Khanadamad cannot be appointed Khanadamad and heir to the ancestral estate

Customs (2.—Punjab)—(Continued).**—4.—Inheritance and Succession—(Contd.)**

left by the appointer of the first Khanadamad. **Sharfa v. Ramzan**, 14 P.R. 1907 = 20 P.L.R. 1908 = 126 P.W.R. 1907.

REID, J.

References:—96 P.R. 1892; 129 P.R. 1893, 19 P.R. 1906; 91 P.R. 1906, *R*.

(8) Thakar Rajputs in Dada Siba jagir, Congra District—Right of sister's issue to inherit in preference to the Jagirdar Ala Malik.

A sister's son is not entitled, by custom prevailing among the Thakar Rajputs, to inherit his maternal uncle's property, in preference to the Jagirdar Ala Malik. The burden of proving that a sister's issue comes within the category of heirs rests upon the persons so alleging. **Gurditta v. Jai Singh**, 72 P.R. 1907 = 31 P.L.R. 1908.

RATTIGAN, J.

Reference:—175 P.R. 1888, *R*.

(9) Right of deceased's ancestor's descendants to inherit in preference to heterogeneous body belonging to a different got

Under the customary law in matters of succession, representation is recognised. The direct descendants of the daughter and the daughter's son of a deceased proprietor's ascendant are, in the absence of all male collaterals, entitled to exclude an heterogeneous proprietary body belonging to a different got. **Waryama v. Hira Nand**, 63 P.R. 1908 = 126 P.W.R. 1908.

ROBERTSON AND CHILVIS, JJ.

References:—77 P.R. 1896, 102 P.R. 1906, 28 P.R. 1904; 95 P.R. 1905, *R*; 141 P.R. 1893, *Diss*.

(10) Sayyads of Tahsil Shujabad—Right of daughter to inherit in preference to the nephews of her deceased father

Sayyads of Shujabad are governed by customary law and not by Mahomedan Law. Among them the nephews of a deceased proprietor succeeds to his estate in preference to his daughter. A daughter cannot exclude a nephew, merely because he is married to one of them, unless some definite ground for holding so is established. **Ahmad Shah v. Ahmad Shah**, 68 P.R. 1908 = 111 P.W.R. 1908.

KENSINGTON AND JOHNSTONE, JJ.

Customs (2.—Punjab)—(Continued).**—4—Inheritance and Succession—(Contd.)**

- (11) *Sahswal Rajput of the Fatehjang Tahsil, Attock District—Right of widow of inferior caste to a life estate in a deceased husband's property.*

A childless widow of a Sahswal Rajput of the Fatehjang tahsil, Attock District, herself belonging to the inferior tribe of Mahars, takes the usual life-estate in her deceased husband's property, and is not merely entitled to maintenance. Neither the *Wajib-ul-arz*, nor the *Ruwa-i-am* is against such right of the widow. **Pir Bakhsh v. Sardār Bano**, 73 P R 1908 = 144 P.W.R. 1908.

CHATTERJI AND JOHNSTONE, JJ

Reference.—44 P.R. 1907, R

- (12) *Aroras of Amritsar - Inheritance—Collaterals succeeding to the exclusion of daughter—Custom set up in contravention of the ordinary law—Burden of proof.*

Where it is sought to be proved, that a high caste Hindu community (like the Aroras of the City of Amritsar) are governed by a custom, directly in contravention of their personal law, the burden of proof lies heavily on the party making such an allegation (a).

It cannot be accepted as an axiom, that the Aroras of Amritsar are bound by custom, found to obtain in other parts of the country, but rulings of Courts on question of custom obtaining among Aroras in other parts may be usefully examined.

Held, that, in this case, the defendants had not established the custom they set up, of collaterals succeeding among the Amritsar Aroras, to the exclusion of daughters (b) **Radho v. Harnaman**, 99 P.R. 1907 = 167 P.L.R. 1908

ROBERTSON AND CHEVILS, JJ.

References.—(a) 16 A. 221, 34 P.R. 1907, 110 P.R. 1906, 24 A. 273; 24 P.R. 1893; 45 P.R. 1900, R. (b) 144 P.R. 1882, 85 P.R. 1884, 148 P.R. 1890 (note); 62 P.R. 1902, R.

- (13) *Awans of Pind Dadan Khan tahsil of Jhelum district—Daughter of sonless proprietor inheriting father's non-ancestral property—Right of disposal of such daughter, in presence of father's collaterals of the ninth degree, whether limited or absolute—Gift by father of self-acquired land to daughter and her inheriting such land—Distinction.*

Customs (2.—Punjab)—(Continued).**—4—Inheritance and Succession—(Contd.)**

Among Awans of Pind Dadan Khan tahsil of the Jhelum district, a daughter, succeeding to her father's non-ancestral property by inheritance, has, in the presence of collaterals of the deceased of the ninth degree, only a limited estate, and not a full power of disposition (a).

The case of gift by a father of his self-acquired land to his daughter is quite different from the case of inheritance of such land by her. In the former case, she might well have full powers of disposition, because her father, whose powers were absolute, chose to confer all his own rights on her, but, when he dies intestate and she succeeds, a totally different situation arises. **Bahadur v. Abdullah**, 121 P.R. 1908

CHATTERJI AND JOHNSTONE, JJ

References.—(a) 18 P.R. and 100 P.R. 1906, R.

- (14) *Kunjpura family of Nawabs State property—Primogeniture—Succession to private property by Mahomedan Law*

Held, that, in the Kunjpura family of the Mahomedan Nawabs, the special custom of primogeniture does prevail as regards succession to all property which formed part of the Kunjpura State before 1849, and that, as regards the rest, the personal law of the parties, i.e., Mahomedan Law applies.

Found, that all lands which were owned by the State as State before 1849, including all the lands then in the Nawab's possession and so entered in the Settlement Records of 1852, form part of the State property. **Nawab Ahsan Ullah Khan v. Nawab Muhammad Ibrahim Ali Khan**, 77 P.W.R. 1908 = 47 P.R. 1908 = 177 P.L.R. 1908.

ROBERTSON AND LAL CHAND, JJ

- (15) *Succession—Adopted son's right to succeed collaterally in adoptive father's family—Burden of proof—Chima Jats of Daska Tahsil, Sialkot District.*

Held, that the defendants, on whom the onus lay (a), had failed to prove the alleged custom that, among Chima Jats of Daska Tahsil of Sialkot District, an adopted son can succeed collaterally in his adoptive father's family (b) **Ram Ditta v. Takht Mal**, 67 P.L.R. 1903 = 50 P.R. 1908 = 104 P.W.R. 1908.

CHATTERJI AND JOHNSTONE, JJ

References.—(a) 12 P.R. 1892 (F B); 61 P.R. 1894; 138 P.R. 1894; 29 P.R. 1895; 18 P.R. 1900 = P.L.R. 1900, p. 49, N. (b) 4 P.R. 1906 = 55 P.L.R. 1900, R.

Customs (2.—Punjab)—(Continued).**—4.—Inheritance and Succession—(Contd.)**

(16) *Succession of daughters—Rights of collaterals of seventh degree—Mahomedan Chohan, Rajputs of Kharwan, Jagadhri tahsil, Umbala District—Suit for declaration—Specific Relief Act, S. 42.*

Where neither the plaintiff nor the defendant in a suit succeeds to prove his possession of the property in dispute, and one party relies on the mutation entry in his favour and the other party on entries in the girdawari papers, but the land in dispute is held in actual possession by mortgagees, by occupancy tenants and by tenants at will, and it was not clear whether the plaintiff or the defendant has received rents from the tenants at will, *held*, that under such circumstances a suit for a mere declaration of title was maintainable (a)

The custom as to the order in which the daughters succeed to the property of their father varies among the various tribes, and so it is unsafe to lay down as a general rule of customary law, regardless of tribe and creed, that daughters are excluded from succession by collaterals however remote

Held, also, that the plaintiffs in the case have failed to prove a custom to the effect that among Chohan Rajputs of Mauza Kharwan, Jagadhri tahsil, Umbala District, collaterals of the seventh degree were entitled to succeed in preference to a married daughter of the deceased sonless proprietor **Abdul Karim v Sahib Jan**, 5 P R 1908 = 29 P.W.R. 1908 = 99 P.L.R. 1908

RATTIGAN AND LAL CHAND, JJ.

Reference (a) 15 M 307, 11 and F

(17) *Brahmins of Gurdaspur, succession among—Hindu Law—Right of collaterals to succeed in preference to daughters and their sons.*

Sansuk Brahmins of the town of Gurdaspur are in matters of succession, governed by the general rules of agricultural custom and not by Hindu Law, and daughters and their issue are therefore excluded by near agnates of the last male proprietor **Nanak Chand v. Bashe-shar Nath**, 3 P R. 1908 = 16 P.W.R. 1908 = 94 P.L.R. 1908.

RATTIGAN AND SHAH DIN, JJ.

References:—73 P.R. 1896, 107 P R. 1901, 119 P.R. 1901; 30 P.R. 1903, 12 P.R. 1906; 16 A. 221, D.; 21 P.R. 1896, 16 P.R. 1906, 58 P.R. 1906; 102 P.R. 1901, &c.

Customs (2.—Punjab)—(Continued).**—4.—Inheritance and Succession—(Contd.)**

(18) *Custom—Succession—Right of *adna malik* to succeed on the death of an *adna malik* as against collaterals—Gov. Pro. Code, Ss. 373 and 582—Appeal—Right of one of several appellants to withdraw his appeal as to his share only*

Held, (1) that the respondent had failed to prove any special custom whereby *adna maliks* succeed to the land left by an *adna malik* as against a near collateral of the deceased

(2) That one of the appellants can withdraw from the appeal so far as his own interest in the appeal is concerned (a) **Gopala v. Hira Singh**, 119 P W R 1908.

REIN, J

References - (a) C A No 300 of 1902 (unpublished) dealing with a contest between *adna maliks* and vendees of the deceased *adna malik* distinguished from this case which was between *adna maliks* and collaterals of the deceased *adna malik*, distinguished 175 P R 1888; 9 P R. 1898, 72 P R 1907, R

(19) *Custom—Succession to land left by *adna malik* dying sonless—Rajputs of Mauza Naranyore, Tahsil Pathankote, District Gurdaspur—Inevitable stand of *adna malik* to recover possession in presence of collaterals of the deceased *adna malik*—Estoppel—Warner*

Held (1) That residence in an adjoining village and not in the village where the property is situate does not ordinarily deprive the collaterals of their right to succession

(2) That plaintiffs entirely failed to prove that by custom they were entitled to recover possession of the land sold by the deceased *adna malik* to the defendant in the presence of collaterals of the deceased *adna maliks*.

(3) That one of the plaintiffs having sued for pre-emption of the land sold by the *adna malik* to the defendant, must be taken to have admitted the validity of the sale.

(4) That three of the *adna malik* vendors, having died nine years before the institution of the present case, and no effort having

Customs (2.—Punjab)—(Continued).**—4.—Inheritance and Succession—(Contd.)**

been made during this period to recover possession on the ground of lapse, the plaintiffs are not entitled to any indulgence **Hiru v. Thakar Das**, 118 P.W.R. 1908

LAL CHAND, J.

(20) *Isa Khel Pathans of tahsil Isa Khel, Mainwali District. Pre-deceased son's widow's right to succeed to a life-interest in her father-in-law's estate*

Where the parties are Isa Khel Pathans of tahsil Isa Khel, Mainwali District, *held*, having regard to the custom prevalent among them, and the conduct of the parties, that the widow of a son who has pre-deceased his father is on the death of her father-in-law entitled to succeed to a life-interest (either jointly with the widow of her father-in-law, if there be any such, or solely if her father-in-law has left no widow), in the property of the deceased **Mehr Khan v. Aziz-ullah**, 84 P.R. 1908 = 158 P.W.R. 1908
CHATTERJI AND RAFFIGAN, JJ

References: 81 P.R. 1898, 157 P.R. 1889 (F.B.), R

21) *Daughter. Collaterals of sixth degree — Hindu Chuhar Rajputs of Tahsil Narain Garhin Umbala District — Onus probandi — Proof of custom against personal law — Method of calculating degrees of relationship — Right of objection up to seventh degree only — Wajib-ul-ara and Rivaj-i-am*

Held, that among Hindu Chuhar Rajputs of Tahsil Narain Garhin Umbala District collaterals of sixth degree cannot exclude daughters from inheriting the ancestral landed property left by their deceased father (a)

Held also that a person asserting a custom that collaterals so remote as of sixth degree exclude daughters is bound to establish it (b)

Obiter. Held — (1) That the deceased as well as the common ancestor are both counted in calculating the degrees of relationship (c)

(2) That as a rule power of objection is limited to fifth or at most the seventh degree (d)

(3) That those who set up a custom opposed to their personal law have to prove that custom (e). **Bholi v. Man Singh**, 86 P.R. 1908 = 146 P.W.R. 1908.

CHATTERJI AND ROBERTSON, JJ

References—(a) Civ. Appeal No. 522 of 1895 (Unreported, Punjab); 36 P.R. 1905, 101 P.R.

Customs (2.—Punjab)—(Continued).**—4.—Inheritance and Succession—(Contd.)**

1895; 40 P.R. 1891; 73 P.R. 1891, 48 P.R. 1899, D, 179 P.R. 1889; 5 P.R. 1908; 11 P.R. 1908, F, 79 P.R. 1891, 75 P.R. 1898; 98 P.R. 1906, R (b) 71 P.R. 1904, F. and Appr; 62 P.R. 1906, Diss, 48 P.R. 1889; 61 P.R. 1898, R. (c) 126 P.R. 1890, F. and Appr (d) 107 P.R. 1887 (F.B.), F. and Appr (e) 149 P.R. 1888, 23 P.R. 1897, F; 110 P.R. 1906 (F.B.), R

(22) *Succession—Nathan Biloches of Sangarh tahsil, Dera Ghazi Khan District—Custom and not Mahomedan Law governed, matters of succession, not established rights of daughters to succeed in preference to collaterals established*

Where the parties being Nathan Biloches of Sangarh tahsil, Dera Ghazi Khan District, the plaintiffs, collaterals in various degrees claimed property in the possession of the defendants, the daughters of the deceased (belonging to the said tribe), on the ground that by custom the collaterals were entitled to exclude daughters, *held*, that, the plaintiffs who were bound to prove the existence of such special custom, among the said tribe, having failed to establish the same or that custom and not Mahomedan Law regulated the Law of Succession among them the rights of daughters to succeed in accordance with the principles of the Mahomedan Law were recognised in the Sangarh tahsil **Ghulam Haidar v. Phaphal**, 92 P.R. 1908 = 155 P.W.R. 1908

ROBERTSON AND KENSINGTON, JJ

(23) *Custom—Hoshnarpu District—Daughter's right to succeed to her sonless father and uncle's property and to contest alienation by aunt—Necessity—Alienation by de facto guardian—Extent of minor's bakalat—Incompetency of village community to inherit in preference to daughter*

Held, that, among Hindu agriculturists of Hoshnarpu District, the daughter of a male sonless proprietor is entitled to inherit the property of her father and uncle after the death of her mother and aunt, and is also competent to contest the validity of the alienation by her aunt where they have left no reversioner, and that there exists no custom allowing the village community to succeed to their property in preference to the daughter

Held, also, that in such a case the daughter can maintain a suit for obtaining immediate possession of her father's share and also for
3763—27.

Customs (2.—Punjab)—(Continued).**—4.—Inheritance and Succession—(Contd.)**

getting a declaration that the alienation by her aunt will not be binding upon her after her aunt's death

Held, further, that in case of an alienation of a minor's property by his *de facto* guardian, the minor's liability extends only to the benefit he derives therefrom. **Nak Badha v Gurdevi**, 136 P.W.R. 1908

STODDON AND CHATTERJI, JJ.

(24) *Awans of Ludhiana Town—Non-agricultural family—Law by which governed in matters of succession, whether Mahomedan or customary*

The Awans of Ludhiana Town, belonging to a non-agricultural family, the members of which had for generations depended upon service or been seeking independent means of livelihood, are, in matters of inheritance, governed, not by the rules of the customary law applicable to agricultural tribes, but by the provisions of the Mahomedan Law.

Where a non-agriculturist, who had purchased agricultural land in a village out of the savings of his income as a contractor, attested a *Istiaji-am*, *held* that his attestation of the *Istiaji-am* was by no means presumptive evidence of his own family following the ordinary customary rules of dominant agricultural tribes in matters of succession. **Jamiat-ul Nisa v Hashmat-ul Nisa**, 124 P.R. 1908.

ROBERTSON AND SHAH DIN, JJ

Reference —110 P.R. 1906 (F.B.), R.

(25) *Jagirdar Khatri Sodhis of Ferozepore District—Widow of a deceased proprietor whether entitled merely to maintenance or to a life estate in the landed property of her deceased husband*

Held, that the plaintiff, who set up the special custom that, among Jagirdar Khatri Sodhis of Ferozepore District, a widow of a deceased proprietor was entitled merely to maintenance, and not to a life estate, in the landed property of her deceased husband, had failed to prove the custom set up by him. **Hukham Singh v. Bhagwan Devi**, 133 P.R. 1908

RATTIGAN AND SHAH DIN, JJ

(26) *Rajputs of the Ramulpindi (now Attack) District—Daughter's son not entitled by custom to succeed in preference to collaterals—Limitation Act, Art. 91—Wills.*

Customs (2.—Punjab)—(Continued).**—5.—Inheritance and Succession—(Contd.)**

Among the Rajputs of the Rawalpindi (now Attack) District a daughter's son is not entitled by custom to succeed in preference to collaterals who are descendants of the grandfather of the last male owner

Art 91 of the Limitation Act has no application to wills (a) **Jahan Khan v. Shahamad**, 134 P.R. 1908.

KENSINGTON AND RATTIGAN, JJ.

Reference —(a) 23 C. 1 (P.C.), R.

(27) *Laghari Bilochs, Sanghar tahsil, Dera Ghazi Khan District—Whether Mahomedan Law or custom governs the parties in matters of inheritance—Right of daughter to inherit her father's ancestral estate in preference to his male collaterals*

Among the *Laghari Bilochs* of the *Sanghar tahsil* of the *Dera Ghazi Khan District*, in matters of female succession, their custom is largely tinged by a preference to Mahomedan Law rules, where the contest is between daughters and collaterals; and a daughter is entitled to claim her share of the ancestral estate of her father in the presence of his male collaterals, descendants of a common grandfather. **Sabbai v Ali**, 136 P.R. 1908

KENSINGTON AND JOHNSTONE, JJ

References —110 P.R. 1906 (F.B.), F., 119 P.R. 1907, Civil Appeal No. 994 of 1889, decided on 24--7 1890 and Civil Appeal No. 199 of 1895, decided on 12 11-- 1897, R

(28) *Right of grand-daughters when their father had pre-deceased his father—Mahomedan Law*

In this case the question was whether grand-daughters inherited, when their father had pre-deceased his father. It was taken for granted that, by Mahomedan Law, they did not inherit under such circumstances. The plaintiffs alleged that by custom they were so entitled. *Held*, the evidence of instances adduced on behalf of the plaintiffs was not strong enough to establish the alleged custom

Held also that no custom excluding grand-daughters from succession in the absence of all other issue was proved by the defendant. **Musammam Gauhar v. Khan Muhammad**, 136 P.R. 1908 (note case, p. 619).

FLOWDEN AND BENTON, JJ.

Customs (2.—Punjab)—(Continued).**—4.—Inheritance and Succession—(Contd.)**

- (29) *Bilochis of the Natkani Datani got of the Sanghar tahsil of the Dera Ghazi Khan District—Right of daughters to succeed—Mahomedan Law.*

Bilochis of the Natkani Datani got of the Sanghar tahsil of the Dera Ghazi Khan District do not strictly follow Mahomedan Law, but their custom of agnatic succession is greatly influenced by the spirit of the Mahomedan Law, and daughters are often allowed to succeed in the absence of sons, and, sometimes, though more rarely, even in the presence of sons. The Natkani Datanis show the greatest favour to daughters and sisters, and allow them to take what would be regarded as their share by Mahomedan Law. No doubt they would not work out this share minutely. They would be guided by the general principle that the female's share should be half that of the males. **Khan Muhammad v. Sher Muhammad**, 136 P R 1908 (note case p. 622)

ROE, C J, AND FRIZZELL, J.

- (30) *Suit by the proprietary body of the pana for possession of land left by a co-sharer of another tribe who had died without lineal descendants—Right to succeed in preference to aunt's son of the deceased proprietor—Mauza Balana, tahsil Panipat, Karnal District.*

The present suit was instituted by the plaintiffs, who form the proprietary body of *pana* Dasondha of the village Balana. They claimed possession, alleging that, a co-sharer of another tribe having died leaving no male lineal descendants, the land reverted to them as proprietors of the *pana*, both by law and custom. The suit was resisted by the defendant who contended that he was related to the deceased proprietor as his aunt's son, and that he was his heir, and that the plaintiffs, as owners of the *pana*, had no right to succeed by law or custom.

Held, that the plaintiffs had failed to prove the custom set up by them, *viz.*, that they as mere co-sharers in the *pana* were entitled to succeed in preference to the aunt's son of the deceased proprietor. **Nihala v. Rahmatullah**, 137 P R 1908

RATTIGAN AND LAL CHAND, JJ.

References.—38 P R 1904; 12 P R 1892 (F.B.), R.

Customs (2.—Punjab)—(Continued).**—4.—Inheritance and Succession—(Contd.)**

- (31) *Shamsi Khojas, Lahore, governed by custom and not by Mahomedan Law in matters of succession.—Presumption—Practice Representation, right of*

There is no initial presumption in favour of the applicability of the personal law to matters of inheritance under the provisions of the Punjab Laws Act, the parties being townsmen and not members of an agricultural tribe. The initial presumption, if at all, is in favour of their being governed by custom which must in each case be ascertained by investigation and enquiry. The Court conducting the trial must ascertain at first the rule of decision by enquiry into the alleged custom, and, on failure of proof of such custom, apply the provisions of the personal law. But the question must be approached with a free mind without any bias in favour of the personal law being applicable (a).

In matters relating to succession, the Shamsi Khojas, Lahore, despite their conversion to Islam, follow and are governed by the rules of Customary Law as found to prevail generally, and not by the strict provisions of the Mahomedan Law (b)

The rule of Mahomedan Law, which excludes issue of predeceased persons from succession, is wholly inapplicable to Shamsi Khojas, Lahore. The usage relating to representation in case of collateral succession, though opposed even to the provisions of Hindu Law, is found to prevail generally in Punjab, without distinction of caste, creed and calling. So sons of a predeceased collateral have a right to succeed by right of representation in presence of their uncle (c). **Mehtab-ud-din v. Abdullah**, 140 P R 1908

RATTIGAN AND LAL CHAND, JJ

References.—(a) 81 P R 1874, 422 r., 4 P R. 1888; 47 P R 1900; 30 P R 1903; 54 P R 1903; 54 P R 1906; R (b) 27 P R. 1868; 39 P R. 1894; 52 P R 1888, R (c) 91 P R 1879; 80 P R 1882; 71 P R 1882; 39 P R. 1884; 3 P R 1890, 8 P R 1907, *cited*.

- (32) *Samra Jats, Tahsil Hafizabad, Gujranwala District—Rule of succession, *pagvand* or *chundavand*.*

The *pagvand* and not the *chundavand* rule, of succession governs the Samra Jats, Tahsil

Customs (2.—Punjab)—(Continued).**—4.—Inheritance and Succession—(Ctd.).**

Hāfizabad, Gujranwala District. **Labh Singh v. Sundar Singh**, 148 P R 1908

CHATTERJI AND RATTIGAN, JJ

References.—4 P R 1891, 29 C. 433 (P.C.), 12 P R 1899, 101 P.R. 1879, R., 84 P.R. 1893, *Exptl.*

(33) Succession to occupancy tenancy—Adopted son of occupancy tenant associating strangers with him—Right of collateral heirs of adoptive father to succeed to the adopted son dying childless. See ACT XVI of 1887 (PUNJAB TENANCY), No. 8, 76 P R 1907

(34) Whether Khatris of Satgara town bound by Hindu Law or custom in matters of succession—Effect of admission. See HINDU LAW (SUCCESSION), No. 10, 181 P L R 1908.

(35) Kitchi Mughals of Mudki Town in Ferozepur District following agriculture for more than a century—Whether raises presumption of having adopted customs of agricultural tribes—Governed in matters of inheritance by Mahomedan Law. See MAHOMEDAN LAW (INHERITANCE), No. 1, 56 P W R 1908

—5.—Marriage

(1) Marriage of a *Rajput* with a *Mahajan* woman in *chatar andazi* form, validity of woman of *Vaisya* caste. See HINDU LAW (MARRIAGE), No. 3, 150 P L R 1908

6.—Pre-emption.

(1) *Sale of house property based on vicinage—Existence of pre-emption Kucha Bati Ram, Delhi City—Joint Hindu family*

The custom of pre-emption exists in respect of sales of house property, based on vicinage, in *Kucha Bati Ram, Delhi City*

Where the parties are members of a joint Hindu family, the right of pre-emption vests in every co-sharer of such joint family. **Ishri Parshad v. Basheshar Nath**, 35 P R 1908 = 92 P W R. 1908—179 P L R. 1908

CLARK, C.J., AND REID, J.

(2) *Pre-emption in respect of sale of house property—Kucha Gulzari Shah, Mohalla Wachhowali, Lahore*

The custom of pre-emption, on sales of house property, based on vicinage, exists in *Kucha Gulzari Shah, part of Mohalla Wachhowali, a*

Customs (2.—Punjab)—(Continued).**—6.—Pre-emption—(Continued).**

sub-division of Lahore **Sundra Das v. Dhanpat Rai**, 16 P R 1907 = 104 P L R 1908 = 127 P W R 1907

ROBERTSON AND LAL CHAND, JJ

(3) *Civil station of Amritsar—Sale of agricultural land—Pre-emption by reason of vicinage*

There is no custom of pre-emption, on sale of agricultural land, on the ground of vicinage, in the civil station of Amritsar. **Ishwar Das v. Duni Chand**, 97 P R 1907 = 70 P L R 1908 = 105 P W R 1907 (Sup.)

CHATTERJI AND RATTIGAN, JJ

References.—21 P R 1906, 22 P R 1906, *Appr.*, 7 P R 1896, 153 P R 1888 D

(4) *Mohalla Parachian, Rawalpindi City—Pre-emption based on vicinage—Sale of house—Value of cases decided on admission.*

The custom of pre-emption based on vicinage does exist in respect of sales of house property in Mohalla Parachian or Matta or Wari Khan, Rawalpindi City. Where the right of pre-emption is shown to exist, there is *ex necessitate rei* a presumption in favour of vicinage (a)

Confessions of judgment and admissions are, of course, of much less value than contested cases properly decided where the custom has been found to exist after due inquiry, but such admissions are not irrelevant and by no means valueless, as they may proceed from the consciousness of the existence of the right and the hopelessness of contesting it (b). **Than Singh v. Tara Singh**, 26 P R. 1907 = 69 P L R 1908 = 109 P W R 1907 (Sup.)

CHATTERJI AND RATTIGAN, JJ

References.—(a) 83 P.R. 1888, R. (b) 69 P. R. 1901; 44 P R. 1903, 42 P.R. 1905, R.

(5) *Right of pre-emption claimed by owner of a house opposite to the house in dispute, but separated by a lane—Proof of general custom of pre-emption not sufficient.*

In a suit for possession by pre-emption of a house situate in *Katra Kanhayian* in Amritsar, the plaintiff, whose house was situated opposite to the house in suit on the other side of a narrow gully, succeeded in proving that the custom of pre-emption prevailed generally in

Customs (2.—Punjab)—(Continued).**—6.—Pre-emption—(Continued).**

that place, but did not prove that it would apply in the case of houses, not adjoining or contiguous but opposite to one another. *Held* that the suit should be dismissed, as it was incumbent on the plaintiff to prove, not only the general custom, but such special incident as would make it applicable to his case (a)

Per Johnstone, J.—Where the plaintiff's house is separated from the house in suit by a road or lane, then, even if the custom of pre-emption prevails in the mohalla or town generally, there is no initial presumption that plaintiff has a right of pre-emption as against a stranger vendee, but plaintiff must prove by instances in the usual way that he has such right. **Mahtub Singh v. Niaz Ali**, 47 P R. 1907 = 68 P L R. 1908 = 125 P W R. 1907.

JOHNSTONE AND CHITTY, J

References—(a) 107 P R 1900, *Diss*, 109 P R 1900 and 68 P R 1906, *F.*, 71 P R 1905, *D.*

(6) Pre-emption—Re-sale to vendor

Where before the institution of a suit for pre-emption of land the vendee had re-sold the land to the vendor and it was contended that the re-sale was a bar to the suit.

Held, that the contention was not valid **Sukha v. Arura Mal**, 165 P L R 1908 = 135 P.W.R 1908

CHEVIS, J

Reference.—29 A. 125, *Diss*.

(7) Pre-emption—Wajib-ul-arz granting right of pre-emption to Sharakyan shikmi, Mauza Harpal, Tahsil Zaffarwal, Sialkot District.

Jointness of holding is not essential to the status of *sharak shikmi*, the term being applicable where the family bond of union still exists

Held, in a suit for pre-emption of a certain land situated in Harpal Mauza, Zaffarwal Tahsil, Sialkot District, a collateral of the vendor had, under the terms of the *wajib-ul arz* of the village, a preferential right on the ground of relationship **Allah Ditta v. Shahua**, 12 P.R 1908 = 22 P.W.R. 1908 = 175 P.L.R. 1908.

CLARK, C.J., AND REID, J

(8) Pre-emption—Muhalla Wadharman, Sialkot City—Right of purchaser to be compensated for improvement.**Customs (2.—Punjab)—(Continued).****—6.—Pre-emption.—(Continued).**

The custom of pre-emption based on contiguity exists in Muhalla Wadharman, Sialkot City

Where a purchaser of a house, subject to the right of pre-emption, makes improvements on it, in spite of the pre-emptor's notice not to do so, the purchaser would not, generally, be entitled to recover the market-value of the improvements and would only be allowed to remove them, when it could be done without injuring the house. But, where the improvements are not unusual and do not greatly enhance the value of the property so as to make it difficult for the plaintiff to pay for them, the plaintiff will have to pay the defendant's expenditure **Buta Singh v. Tara Singh**, 122 P R 1907 = 87 P W R 1907 = 49 P.L R 1908.

CHATTERJI AND JOHNSTONE, JJ

(9) Pre-emption in respect of shops—Katra Patranjan.

No right of pre-emption exists by reason of vicinage in respect of shops in Katra Patranjan, Amritsar City **Karim Bakhsh v. Watta Mal**, 13 P R 1907 = 7 P L R 1908 = 106 P W R 1907 (Sup)

REID, J

References—46 P R 1882, 99 P.R 1906, 113 P.R 1906, *R*

(10) Katru Ahluwalia, Amritsar City—Sale of residential quarters converted into shops—Pre-emption.

Property, which is primarily a residential house situate in Katra Ahluwalia, is subject to custom of pre-emption by vicinage. It is not sufficient, to change the character of the building as a residential quarter, that, for some time past, it has been occupied only by casual tenants, or that portions have been used as godowns by persons, who held their business shops elsewhere **Dial Singh v. Bakshish Singh**, 21 P.R 1907 = 24 P L R 1908 = 129 P.W.R 1907.

ROBERTSON AND LAL CHAND, JJ.

References :—108 P.R. 1895; 12 P.R. 1896, *R*.

(11) Mohalla Haveli Khan Duran Khan, Dulla City—Sale of house property.

The custom of pre-emption obtains, when there is a sale of house property, in Mohalla

Customs (2.—Punjab)—(Continued).**—6—Pre-emption—(Concluded).**

Haqeli Khan Duran Khan, Delhi City. Abdul Ghafur Khan v Muhammad Ziauddin Khan, 147 P.R. 1908.

CHATTERJI AND JOHNSTONE, JJ

References —20 P.R. 1906, 122 P.R. 1906, *relied on*, 2 P.R. 1908 (**F B**). *It*

(12) Punjab Pre-emption Act (II of 1905), S. 12 (a) —Pre-emption based on relationship—Reversioner of a female included within the meaning of the section—Hindu Law—Inheritance. See ACT II OF 1905 (PUNJAB PRE-EMPTION). No. 8, 131 P.W.R. 1908

(13) Pre-emption, right of—*Ruay-i-am* reciting custom set up—Correctness of entry in it not supported by instances—Effect. See ACT II OF 1905 (PRE-EMPTION ACT), No. 3, 90 P.R. 1908

(14) Pre-emption in bhayachara village on ground of relationship—proof of special custom—Custom of whole tahsil tribe by tribe. See PRE-EMPTION, No. 18, 44 P.R. 1907 = 82 P.L.R. 1908

—7—Shamilat Land

(1) *Jurisdiction of Civil and Revenue Courts—Suit for declaration that plaintiff had muqarrardaric rights in land—Registration Act (III of 1877), S. 17 (d)—Lease—Documents constituting perpetual lease.*

The plaintiff sued for a declaration that he had *muqarrardaric* rights in the *shamilat* of a village created by deeds executed by or on behalf of the proprietary body who owned the *shamilat*,

held, (1) that the suit was cognisable by Civil Court,

(2) that the deeds constituted perpetual lease and not being registered were not admissible in evidence,

(3) that the deeds could not bind those owners, who did not join in their execution, and that the suits must be dismissed. **Jhanda Khan v. Abbas Khan**, 189 P.L.R. 1908

SHAH DIX AND KENSINGTON, JJ

—8.—Wills.

(1) *Awans of Rawalpindi Tahsil—Power of a sonless proprietor to will away ancestral property to daughter in presence of his brother—Gifts and wills*

Among the Awans of Rawalpindi Tahsil, a sonless proprietor can, by custom, make a valid bequest of ancestral property in favour of

Customs (2.—Punjab)—(Continued).**—8.—Wills.—(Continued).**

his daughter, in the presence of his own brother (a) In this respect gifts and wills are in the same footing (b) **Amir Ali v Baggo**, 15 P.R. 1907 = 35 P.W.R. 1907 = 4 P.L.R. 1908

JOHNSTONE, J

References .— (a) 81 P.R. 1879, 64 P.R. 1892; 115 P.R. 1892, 31 P.R. 1893, 23 P.R. 1877, 39 P.R. 1877, 36 P.R. 1891, 81 P.R. 1894, 93 P.R. 1894, 126 P.R. 1894, 15 P.R. 1895, 9 P.R. 1899, 14 P.R. 1903, 8 P.R. 1906, 8 P.R. 1879, 7 P.R. 1891, 107 P.R. 1894, 13 P.R. 1902; 176 P.R. 1888, 53 P.R. 1899, 52 P.R. 1892; 79 P.R. 1896; 49 P.R. 1898, 46 P.R. 1900, 121 P.R. 1886, 171 P.R. 1889; 108 P.R. 1893, 188 P.R. 1895, 22 P.R. 1899, 26 P.R. 1901, 107 P.R. 1887 (**F.B.**), *It* (b) 48 P.R. 1903 (**F B**), *It*

(2) *Alienation by sonless proprietor of ancestral immovable property to daughters—Right of collaterals of eighth degree to contest alienation* Rattal Jats of Jallo tahsil Lahore

Among the Rattal Jats of mouza Jallo, tahsil Lahore, a sonless proprietor made a will in favour of his daughters bequeathing his ancestral immovable property to them. This alienation by will was contested by his collaterals of the eighth degree. *Held*, the collaterals cannot succeed, on the ground, that it was not shown that they had the right to contest such an alienation made to a daughter, or that they had the right to succeed in preference to a daughter among the tribe to which they belonged.

Pedigree tables which extend beyond the seventh or eighth degree are, in most cases, as visionary as those which, in the case of some exalted families, derive descent from the Sun and the Moon. Though Hindu Law in its strictness is never followed in agricultural communities, yet the influence of ideas inherent in Hindu Law is certainly not without its effect upon customary law in the case of Hindu tribes or tribes of Hindu origin. **Rajo v. Karam Baksh**, 11 P.R. 1908 = 13 P.W.R. 1908 = 92 P.L.R. 1908.

CHATTERJI AND ROBERTSON, JJ

(3) *Hamdani Sayads of Talagang Tahsil, Jhelum District—Proprietor owning acquired property—Whether male proprietor can bequeath such immovable property.*

In the Jhelum District and among the Hamdani Sayads of Talagang tahsil, a male proprietor can make a valid bequest of his self-acquired

Customs (2.—Punjab)—(Concluded).**—8.—Wills—(Concluded).**

property, apart from his ancestral property. **Ahmed Shah v. Fateh Bibi**, 132 P.R. 1908.

CLARK, C J., AND RATTIGAN, J.

References:—71 P.R. 1904, 85 P.R. 1904 and 22 P.R. 1904, D

Customary rent

Effect of—paid by ryots on rent of *zerai* lands See *MESNE PROFITS*, No 1, 12 C.W.N. 650

Cy pres doctrine

(1) *Application to charity provided by a Parsi donor*

Where under altered circumstances, through lapse of time or through other causes, it appears to the Court, that the charity provided by the donor could not be carried out literally in terms of his directions, with any benefit whatever to the objects of his benefaction, the Court ought not to hesitate to give its sanction to a scheme, which will carry out the charitable intentions of the donor, to be gathered from the instrument establishing the charity, as nearly as possible to the original intentions of such donor. *In re Hormasji Framji Warden* 9 Bom. L.R. 1203=32 B 214

DAVAR, J.

Damage.

(1) Suit for injunction restraining defendants from obstructing channel of Government irrigating plaintiff's lands—Whether any express finding that actual was suffered by plaintiff necessary—Burden of proof as to See *INJUNCTION*, No 1, 3 M.L.T. 273

Damages.

(1) —for breach of contract—Vendor and purchaser—Contract to sell immovable property—Damages for breach of the contract—Contract Act (IX of 1872), S. 73.

The rule in *Flureau v. Thornhill* (a) and *Bain v. Fothergill* (b), that the purchaser of real estate cannot recover damages for the loss of his bargain, but only his deposit and expenses, does not apply to cases of wilful default, nor to unreasonable omission to complete the title by taking some definite steps in the vendor's power (c).

In India, in cases of breach of contract for sale of immovable property through inability on the vendor's part to make a good title, the damages must be assessed in the usual way,

Damages—(Continued).

unless the parties expressly or impliedly contract that such inability should not make the vendor liable for damages. **Ranchhod Bhanwan v. Manmohandas Ramji**, 9 Bom. L.R. 1087=32 B 165

MACLEOD, J.

References —(a) 21 W.L.B.L. 1078, Diss (b) 7 Eng. and Ir. Ap. 158, D (c) 42 B. 69, 2 Cl. 320, K¹, 11 B. 272, not followed

(2) *Suit for exclusive possession by plaintiff entitled only to joint possession—Plaintiff ousted from such possession—Right to damages.*

Where a plaintiff, who was only entitled under a lease to joint possession of a certain property, claimed exclusive possession of a specific portion of the property as against a member of a family from whom he was undivided, held, he was not, if ousted from his exclusive possession entitled to receive damages on the footing that the ousting was wrongful as regards his interest in the property as an undivided member of the family. **Marri Ramanna v. Ghattamaneni**, 3 M.L.T. 277=18 M.L.J. 258.

WHITEL, C J. AND MILLER, J.

(3) *Suit for damages for breach of contract in writing registered Limitation Limitation Act Art. 116. See LIMITATION ACT, No 82, A.W.N. (1908), 160.*

(4) , suit to recover, for breach of covenant contained in lease—Terms of lease embodied in registered pattah—Art. 116, Limitation Act, governs the case See *LIMITATION ACT*, No 81, 12 C.W.N. 628

(5) True measure of, what is Character of possession before trespass to be ascertained to arrive at true measure of. See *MESNE PROFITS*, No 1, 12 C.W.N. 650

(6) —, suit for, based on fraud—Plaintiff may state approximate amount claimed and may offer more Court fees if more damages are found to be due. See *COURT FEES ACT*, No. 11, 17 M.L.J. 625.

(7) Questions as to liability of defendant to compensate plaintiff and as to amount of damages—First Court holding plaintiff not entitled to damages and dismissing suit—Court of appeal holding plaintiff entitled to damages and remanding suit for ascertainment of damages—Practice. See *CIV. PRO. CODE*, No. 315, 8 C.L.J. 159.

Damages—(Concluded).

(8) Suit to recover damages for defamation—Malice, proof—Communication privileged See DEFAMATION, No. 1, 83 P.R. 1908.

(9)—, measure of—Whether only pecuniary loss of deceased's family, or, mental suffering of survivors also, to be taken into consideration See ACT XIII OF 1885 (FATAL ACCIDENTS), No. 1, 4 M.L.T. 238.

(10) Running of interest stopped, when payable as— See CONTRACT ACT, No. 1, 4 M.L.T. 335

(11) Suit for—See MALICIOUS PROSECUTION, Nos. 1 and 2, 12 C.W.N. 818 (h) and 817

Damdapat

(1)—, rule of.

The rule of damdupat does not absolve a debtor from liability for the interest due when he re-pays the principal, it merely prescribes that the amount of the former must not exceed that of the latter. By paying off the principal, he does not escape liability for the interest that he was bound to pay with the principal, nor, under such circumstances, is it any defence to a suit to recover the interest to plead that at the date of the suit no principal is outstanding **Karamchand Sadhumal v. Bulchand Seumal**, 2 Sind L.R. 10

LUCAS, J.C., AND KNIGHT, A.J.C.

References 90 B. 452, 20 B. 611 A

Darkhast Rules (Madras)

(1) *Darkhast of land within port limits—Power of Divisional Officer to make a grant without notice to Presidency Port Officer—Want of notice, effect of*

Where the Divisional Officer, before making a Darkhast grant, did not refer the application to the Presidency Port Officer as required by Government Order, dated 4th July, 1890, M.S. No. 4017, Rev., embodied in the Board's Proceedings, No. 434, dated 21st July, 1890 it was held that the grant was within the scope of his authority and that the Crown was bound by such a grant

Though, under the Government Order, the Divisional Officer was enjoined to consult the Presidency Port Officer before making a grant of land in Port limits, the ultimate decision rested with him. Government Order did not say that he was bound to follow the opinion of the Presidency Port Officer.

Per Sankaran Nair, J.—A grant, purporting to have been made under the Darkhast Rules by an officer empowered by them to make it,

Darkhast Rules (Madras)—(Concluded).

is binding on the Crown unless it is revoked or annulled by an officer of a higher grade, on an appeal being preferred to him (a).

The notice to the Port Officer is only a formality, and the omission to give such notice cannot be more than an irregularity, as the Revenue Officers are not bound to follow the opinion of the Port Officer and are entitled to make the grant even in opposition to it. **Mahammade alias Hummade Beari v The Secretary of State for India in Council**, 18 M.L.J. 62=4 M.L.T. 264=31 M. 264

MUNRO AND SANKARAN NAIR, JJ

References - (a) 26 M. 268 and 26 M. 742, F.; 12 M. 406, 18 M. 444, R

Dead man

Appeal presented on behalf of deceased party—Legal representative brought on record—Delay—Immolation Act, S. 5 See APPEAL (GENERAL), No. 3-c 18 M.L.J. 461.

Debt.

(1) *Discharge of debt with proceeds of debtor's jewels on debtor's authority—pledge—Subsequent redemption—Revival of debt.*

Where a creditor discharged a debt due to him with the proceeds of the pledge of the jewels which the debtor authorised him to pledge, the fact that the creditor subsequently chose to redeem the jewels could not revive the debt which had once been discharged **Nilakantam Asari v Chockalingam Asari**, 3 M.L.T. 293

WALLIS AND MUNRO, JJ

(2)— includes arrears of rent, due under sublease, payable to lessor's zemindar—Liability to be attached and sold under S. 260, C.P.C. See CIV. PRO. CODE, No. 173, 5 A.L.J. 265

Debtor and creditor.

(1) Place of payment of debt not specified—Debtor to follow his creditor—Civ. Pro. Code, S. 17. See CONTRACT, No. 3, 11 O.C. 191.

(2) Debtor ready to pay—entitled to reasonable facilities for payment—Notice by debtor. See CONTRACT ACT, No. 1, 4 M.L.T. 335.

Debutter estate.

Representation in suit by person acting under the authority of shebait—Res judicata—Identity of subject-matter not essential—Judgment in previous suit—Admissibility—Evidence Act (I of 1872), S. 13.

Debutter estate—(Concluded).

A decision obtained in a suit instituted in his own name by a person who was in possession of, and had authority to represent, the *debutter* estate under an *arpannama* from the *shebat*, and who, in fact, did represent the *debutter* estate, is binding on a succeeding *shebat*, on the principle of the case in 2 L.J. 145 (a) **Raja Ranjit Sinha Bahadur v. Basanta Kumar Ghose**, 12 C.W.N. 739

STEPHEN AND MOOKERJEE, JJ.

References—(a) 11 C.W.N. 489=6 C.L.J. 404, 12 M. 235 and 9 Bom. 198=2 I.A. 145, R.

--See RELIGIOUS ENDOWMENTS.

--See SHERAIT.

Declaratory suit

- (1) *Claim for declaring that defendant was not pregnant at her husband's death, &c., not maintainable* --Pleader's fee

Where N sued for a declaration to the effect that B, his aunt, is not pregnant and was not pregnant at the time of her late husband's death, and the suit was valued for jurisdictional purposes at Rs. 5,500

Held, that the suit is of purely a speculative nature and the Courts should refuse to exercise their discretionary power of relief in favour of persons who bring suits of this description

Held, also, that where a plaint in a declaratory suit like the above has been rejected, it is not proper to allow pleader's fee on the jurisdictional value **Sardar Narain Singh v. Musammat Basant Kaur**, 124 P.W.R. 1908

RATTIGAN, J.

- (2) *Declaration, right to—Rights in property affected—Subsequent conduct of defaulter.*

Where one of the shareholders of a property purported to mortgage the whole estate, **held** the other shareholders had a right to the declaration that the defendant could not alienate their share, and this, notwithstanding that subsequently to the suit the defaulter had paid off the mortgage debt **Sonabhan Bibi v. Nathmal Kerasi**, 8 C.L.J. 185

BRETT AND COXE, JJ.

(3) *Suit for declaration of right to inspect books of company—Suit in the nature of application for mandamus—Conditions on which relief can be given.* See CORPORATION, No. 1, 12 C.W.N. 825 (P.C.)

Declaratory suit—(Concluded).

(4) *Proviso to S. 42, Specific Relief Act—One plaintiff out of possession—Other plaintiff in possession in defendant's right—Whether right to any further suit for possession affected.* See SPECIFIC RELIEF ACT (1 OF 1877), No. 8, 5 A.L.J. 640

(5) *Nature of declaratory decree.* See HINDU LAW (REVERSIONER), No. 1, 18 M.L.J. 17.

(6) *Declaratory decree enabling worship in accordance with Wahabi rituals in mosques chiefly used by the Hanafi sect—Conditions for exercising right.* See MAHOMEDAN LAW (GENERAL), No. 2, 12 C.W.N. 289.

(7) *Negative declaration—Declaration at the instance of a person having only a contingency—Court's discretion.* See JURISDICTION (GENERAL), No. 4, 12 C.W.N. 777.

(8) *Talukdar's liability to assessment, not in issue.* See REG. VIII OF 1793 (BENGAL DECENNAL SETTLEMENT), No. 1, 8 C.L.J. 329.

(9) *Plaintiff in possession asking declaratory decree—Limitation.* See LIMITATION ACT, No. 9, 5 A.L.J. 637

(10) *Alienation by widow—Competency of her presumptive to maintain, in presence of widow's issueless daughter—Brahmins of Mouza Sambaha, Ambala District.* See HINDU LAW (ALIENATION), No. 14, 149 P.R. 1908

(11) *Plaintiff's chance of succession to the property in suit very remote—Dismissal of suit.* See SPECIFIC RELIEF ACT, No. 6, 51 P.L.R. 1908

(12) *Right to recover losses and expenses contingent on an uncertain future event.* See DECREE, No. 7, 2 Sind. L.J. 33.

Decree.

- (1) *Decree prescribing a condition—Appellate decree confirming it—Time for performance of condition—Construction of decree.*

A decree of the appellate Court merely confirming the decree of the lower Court does not give the plaintiff fresh time for performing a condition of the original decree (a)

A decree of the original Court provided that on the plaintiff's paying into Court the balance of consideration, within a month from the date of the decree, the defendant should execute a sale-deed of the suit land in plaintiff's favour. The plaintiff did not pay the amount within the month, and after the expiration of that period, the defendant appealed. The decree of

Decree—(Continued).

the appellate Court simply confirmed the decree of the lower Court. *Held*, that the plaintiff would not be entitled to execute the decree, on making a deposit of the amount within a month from the date of the appellate decree.

It is desirable that appellate Courts should frame their decree in such a manner as to leave no doubt as to whether it is intended to extend the time for performing the conditions precedent imposed by the original decree. **Ramasamy Kone v. Sundra Kone**, 17 M.L.J. 495 = 3 M.L.T. 26 = 31 M. 28.

BENSON AND WALLIS, JJ.

References,—(a) 11 A. 346; 11 B. 172; 13 C. 13. 15 M. 170; 25 C. 311, 18 A. 223; 15 B. 370, 23 A. 152, B.

(2) *Suit to set aside—No fraud—Right to sue—Civ. Pro. Code, Ss. 447—Next friend ceasing to be a guardian under the Guardian and Wards Act.*

H instituted a suit for redemption which was decreed. The decree was affirmed on appeal by the High Court. On appeal to the Privy Council, the decree of the High Court was reversed, the Privy Council directing that an account should be taken of the defendant's receipts and payments under the mortgage deed and the ultimate balance due should be certified. H had died before the High Court gave its decision, and his three minor sons were substituted on the record, and their mother appointed as their next friend. She had also been appointed by the District Judge as their guardian under the Guardian and Wards Act. After the decision of their Lordships of the Privy Council, the High Court transmitted their order to the Court below, under S. 610 of the Civ. Pro. Code, with directions to carry it into execution. A pleader appeared for the minors in these proceedings, but, on the 9th of May 1905, after the accounts had been rendered by both the parties, and it only remained to examine and consider these accounts, the pleader informed the Court that he had no instructions and could not proceed further. The Court, however, after considering the accounts passed a decree on the 16th of May 1905. Meanwhile the mother of the minors had made an application to the District Judge stating that one of the minors had attained majority and praying that he might be appointed in her place, guardian of the other two minors. This application was granted on the 3rd of February 1904. The

Decree—(Continued).

Subordinate Judge was not informed of this, nor was any application made on behalf of the two minors for substitution of their major brother as their next friend in place of their mother who accordingly continued to be their next friend in the case pending before the Subordinate Judge. Then the major son of H applied on his own behalf and on behalf of his minor brothers for a re-instatement of the case and a re-hearing after investigation of the accounts, alleging that they were not represented when the accounts were examined by the Subordinate Judge. This application was refused and no appeal was made against the order refusing it. Then the present suit was commenced, the sole prayer for specific relief being that the decree of the 16th of May 1905 may be set aside.

Held, that the suit did not lie inasmuch as the only relief claimed was that the decree passed by the Court may be set aside. Even if fraud on the part of the defendant had been alleged, the Court would not have any jurisdiction to set aside the decree. If other relief had been prayed for, and there were proof of fraud in obtaining the decree, it might be open to the Court to treat the decree as a nullity and to give suitable relief. But fraud not having been alleged or proved and no specific relief having been asked for, except the setting aside of the decree the suit could not be decreed (a). **Banarsi Pershad v. Ram Narain**, 5 A.L.J. 35 = A.W.N. (1908), 23 = 3 M.L.T. 128 = 30 A. 105.

STANLEY, C.J., AND BURKITT, J.

Reference.—(a) 29 A. 418, B.

(3) *Execution of—Finality of—Decree for pre-emption.*

A decree cannot be regarded as having become final, before the date on which the period for preferring an appeal expires. **Gopal Dass v. Mamman Kunwar**, A.W.N. 1908, 13 = 5 A.L.J. 136.

AIKMAN, J.

References.—1 A. 132, 7 A. 107, F.

(4) *Its construction—What specific moveable property—Its execution against the judgment-debtor admittedly not in possession of the property—Power of executing Court to refer to judgment and other documents to interpret decree—Civ. Pro. Code (Act XIV of 1882), Ss. 206, 208 and 259.*

Decree—(Continued).

In a suit for recovering three-fourths of an estate, consisting of moveable and immoveable (valued at Rs. 6,800) property, a decree, based on the compromise, was passed in the following terms:—"It is ordered that decree by consent or three-fourths of Nur Bakhsh's estate, both moveable and immoveable property, be given in plaintiff's favour. Plaintiff pays to defendants Rs. 5,000 for expenses, and &c. No costs allowed, Rs. 5,000 paid into Court."

Held, with reference to the compromise and the plaint, that this decree sufficiently complies with the provisions of S. 208 of C.P.C., and under it the decree-holder can recover three-fourths of the moveables or its value, Rs. 6,800 by executing it as provided under S. 259 of the same Code, against any of the judgment-debtors, it being immaterial whether any of them has or has not possession of the moveable property decreed (a).

Held, also, that an executing Court's business is simply to interpret the decree as it stands and not to question its correctness, but it is at full liberty to refer to the judgment or any other document on the file in order correctly to interpret it, and when there is a divergence between the decree and the judgment, the proper course is to direct the decree-holder to apply for amending the decree to the Court which originally passed it. **Radha Mal v. Imam Bakhsh**, 60 P.W.R. 1908

ROBERTSON AND SHAH DIN, JJ

Reference.—(a) 1 C.W.N. 170, D.

(5) *Against son as representative of father, validity and binding nature of.*

A decree was obtained against the son of a deceased as latter's representative, **held**, that as such representative, he was bound to pay out of the assets of the deceased. **Y. Baharathan Batter v. N. Narayanan Nair** 3 M.L.T. 314.

SANKARAN NAIR, J

(6) *Execution sale—Property purchased subject to a mortgage, but not mortgage executed by judgment-debtor—Estoppel—Purchaser equally bound as judgment-debtor.*

The question raised in this case was one of law and it was this. Whether or not a purchaser in execution of a money decree purchased property, subject to a mortgage, though the mortgage was not executed by judgment-debtor himself, when the judgment-debtor would himself be estopped from denying liability under the mortgage on account of his conduct

Decree—(Continued).

in the mortgage transaction? **Held**, that the purchaser was equally bound, as the judgment-debtor, inasmuch as the right, title, and interest of the judgment-debtor had passed to him (the purchaser), and so the property purchased by him would be subject to the mortgage. **Pra-yag Raj v. Sidhu Prasad Tewari**, 35 C. 877.

MITRA AND CASPERSZ, JJ.

References.—9 C 265, 20 C 296 (P.C.); 22 C. 909; 10 C.W.N. 313; 11 B.L.R. 46, R.

(7) *Right to recover losses and expenses contingent on an uncertain future event—Decree, whether executable—Civ. Pro. Code, S. 314.*

Where a decree directed that the plaintiff should satisfy certain debts due jointly by him and the defendant, and that, if he failed to do so, and if any creditors made defendant pay any amount, the plaintiff should be liable to pay the same along "with losses and expenses," to the defendant, who should be entitled to have the money by execution through the Court, **held**, that the right to recover losses and expenses, being a right contingent on uncertain future events, could not be ascertained in execution of the decree itself, but was merely declaratory. It could only be enforced in a regular suit instituted in that behalf (a).

Held, also, that the direction that the defendant could by execution recover something which was altogether *dehors* the decree was therefore meaningless and incapable of being enforced. **Gokaldas Dwarkadas v. Otandas Dwarkadas**, 2 Sind. L.R. 33.

PRATT, J.C., AND HAYWARD, A.J.C.

Reference.—(a) 1 Sind. L.R. 184, R.

(8)—directing sale of mortgaged property includes costs awarded by it—Procedure to be followed by decree-holder in recovering costs. See TRANSFER OF PROPERTY ACT, No. 60, 12 C.W.N. 364.

(9)—, personal, against *shebait*, attachment of immoveable property in execution of—Validity of objection that property is *debutter* triable under S. 244, Civ. Pro. Code. See Civ. Pro. CODE, No. 157, 12 C.W.N. 310.

(10)—based upon private award and on one made through Court's intervention, whether any difference between—whether appeal lies against decree based on private arbitration award. See CIV. PRO. CODE, No. 282, A.W.N. (1908), 54.

Decree—(Continued).

(11) Form of decree—Suit against successor in the office of manager of a *mutt* for debt incurred by predecessor. See RELIGIOUS ENDOWMENTS, No. 3, 17 M.L.J. 553=3 M.L.T. 95.

(12) Sons of deceased Hindu brought on record in pending suit as father's legal representatives—Form of decree to be passed. See HINDU LAW (DEBTS), No. 2, 18 M.L.J. 36.

(13) Satisfaction of, not certified 'owing to decree-holder's fraud—Application by judgment-debtors after time to have certified. See CIV. PRO. CODE, No. 172, 12 C.W.N. 485.

(14)—passed against benamidar binds beneficial owner. * See BENAMI TRANSACTIONS, No. 2, 4 A.L.J. 680=30 A. 30.

(15) Adjudication on rights of defendants in an interpleader suit is a, and appealable. See CIV. PRO. CODE, No. 5, 4 A.L.J. 683=A.W.N. (1907), 270=30 A. 22.

(16) Dismissal of appeal under S. 551, C P C, is a—superseding that of the Court below. See CIV. PRO. CODE, No. 30, A.W.N. (1908), 109.

(17)—, alteration of, of first Court so as to make co-defendant liable directing recovery of mortgage-debt against co-defendant in favour of plaintiff, upon appeal by defendant. See APPELLATE COURT, No. 1, 12 C.W.N. 720.

(18) Order dismissing application to set aside award, whether decree. See ACT IX OF 1899 (ARBITRATION), No. 3, 14 Bur. L.R. 129.

(19)—Character of, on what depends. See LANDLORD AND TENANT, No. 18, 7 C.L.J. 652.

(20)—ordering sale of non-existent village, incapable of execution—Reasons. See EXECUTION OF DECREE, No. 14, 5 A.L.J. 403.

(21) Suit tried partly by one Judge and partly by another—Preliminary order by first Judge before completion of evidence, whether decree—Effect. See CIV. PRO. CODE, No. 105, 4 L.B.R. 256.

(22) *Ex parte* decree under S. 90, Transfer of Property Act—Inherent power of Court to set it aside—Personal decree for a large sum not to be made *ex parte*—Decree under S. 90 when can be passed—S. 4, Succession Certificate Act. See TRANSFER OF PROPERTY ACT, No. 61, 35 C. 767.

(23) Money-decree against several defendants—Agreement discharging one of them—Part adjustment of decree—Certificate necessary. See CIV. PRO. CODE, No. 169, 4 M.L.T. 229.

Decree—(Concluded).

(24) Where Court has to execute a decree which is badly drawn up and ambiguous, it is permissible to refer to the pleadings in the suit. See EXECUTION OF DECREE, No. 23, A.W.N. (1908), 257.

(25) Whether, is declaratory or capable of execution—Construction of—Intention of parties. See CONSTRUCTION OF DECREES, No. 1, 4 M.L.T. 330.

(26)—See EXECUTION OF DECREE.

(27) Order refusing to stay execution of a decree under appeal, whether a—. See CIV. PRO. CODE, No. 5-a, 2 Sind. L.R. 24.

(28)—directing sale of *wakf* property, validity of. See CIV. PRO. CODE, No. 158, 18 M.L.J. 21.

(29) In suit to enforce mortgage bond, executed by two joint brothers, against surviving brother and sons of deceased brother, more than six years after due date of bond, nature of. See HINDU LAW (JOINT FAMILY), No. 2, 7 C.L.J. 195.

(30)—See CONSTRUCTION OF DECREES.

(31)—See EXECUTION OF DECREE.

Decree-holder.

(1) Executing mortgage decree—Recovery of costs awarded by decree—whether properties other than those mortgaged saleable for the purpose. See TRANSFER OF PROPERTY ACT, No. 60, 12 C.W.N. 364.

(2)—not making claim within time prescribed by the Bundelkhand Encumbered Estates Act against judgment-debtors taking benefit of the Act—Right to recover from judgment-debtor, that had not availed himself of the Act, anything more than his proportionate share of debt. See ACT I OF 1903 (N.W.P.), No. 1, A.W.N. (1908), 43.

(3) Right of survivor of joint decree-holders to execute a decree passed in their favour—Heir of a decree-holder, right of, to execute decree. See ACT VII OF 1889 (SUCCESSION CERTIFICATE), No. 3, 10 O.C. 378.

(4) One of several—as minor—right to extension of time after cessation of disability—right to execute whole decree. See LIMITATION ACT, No. 12, 7 C.L.J. 308.

(5)—putting property to sale without disclosing his lien, effect of—Purchaser without notice, liability for the undisclosed lien. See EXECUTION OF DECREE, No. 13, 11 O.C. 206.

Deed.

(1) Cancellation of—Conditions—Equity. See CANCELLATION OF DEED, No. 1, 150 P.R. 1908.

(2)—See CONSTRUCTION OF DEEDS.

Defamation.

(1) *Minister of charitable institution communicating to a lady attached to the mission, intimating his disapproval of her proposed marriage—Communication privileged—Malice, proof of.*

Where a minister in charge of a charitable institution having promised to perform the marriage between a lady attached to the mission and the plaintiff, subsequently wrote to the lady, on further information supplied to him, regretting that he could not conscientiously have anything whatever to do with her marriage with the plaintiff, informing her at the same time that he had not sought for information and made inquiries, but that facts had been brought to his notice which he had taken trouble to look into, and that he was forced to the painful conclusion that the plaintiff was altogether unworthy of her, *held* that such communication by the clergyman was a privileged communication, and that a suit to recover damages for defamation by the plaintiff could not be sustained, no malice having been proved. Where the existence of a privileged occasion is established, the plaintiff must give affirmative proof of malice, that is, dishonest or reckless ill-will, in order to succeed. It is not for the defendant to prove that his belief was founded on reasonable grounds, and there is no difference in this respect between different kinds of privileged communication. To constitute malice there must be something more than the absence of reasonable ground for belief in the matter communicated. **X v Z**, 83 P.R. 1908 = 152 P.W.R. 1908.

CLARK, C.J., AND REID, J.

(2) Whether action for libel or slander will lie against accused persons defending themselves—Whether and when reply to notices of action are privileged—Whether such action will lie against judges, counsel, witnesses, or parties for words written or spoken during proceeding before Court or legal tribunal. See TORT, No. 4, 18 M.L.J. 353.

Defence

Conditions under which Court may strike out—of defendant. See CIV. PRO. CODE, No. 99, C.L.J. 295.

Dekhan Agriculturists Relief Act.

—See ACT XVII OF 1879 (BOMBAY).

Delay.

(1) Effect of delay on a claim to mandatory injunction. See EASEMENT, No. 1, 12 C.W.N. 519.

(2)—by reversioners in suing to protect their reversionary rights—Effect. See CUSTOMS (PUNJAB) ALIENATION, No. 4, 36 P.W.R. 1908.

(3) What amounts to unreasonable delay. See CO-OWNERS, No. 2, 4 N.L.R. 120.

Demarcation.

(1) *Demarcation of village boundaries accepted by Settlement authorities and agreed to by defendants, suit by Government to impugn correctness of—Secretary of State for India in Council, suit for possession of land by.*

In December, 1866, it was decided, as between Government on the one hand and the defendants or their predecessors on the other, that the whole of the town of Tanda should be regarded as Nazul property with the exception of the hamlet of Nawagunj. This decision was upheld in appeal in 1871. In March, 1871, the Deputy Commissioner passed an order directing that the boundary should be demarcated. An *amra* was appointed to demarcate and he submitted a report, together with a map in which the boundary was shown. This demarcation was accepted by the Settlement authorities and the Settlement papers were drawn up accordingly. The demarcation of the boundary was accepted as correct by the defendants or their predecessors in title under a *raznamah* dated the 29th May, 1872. The defendants or their predecessors had been in possession of the land, which was demarcated as their property, ever since 1872, and this area of land was included in the *had-bast* village M. which was settled with the defendants and their co-sharers. In 1904, the Government brought a suit for possession of certain lands, alleged to have been wrongly included in the hamlet of Nawagunj and impugned the correctness of the proceedings and demarcation which had taken place in 1872.

Held that, having regard to the circumstances of the case and the conduct of the parties through a long period of more than 30 years, the plaintiff was bound to abide by the demarcation proceedings of 1872 and could not be allowed to impugn their correctness. **Lach-**

Demarcation—(Concluded).

man Parshad v. Secretary of State for India in Council, 11 O.C. 30.

GRIFFIN AND EVANS, J.C.S.

References.—(a) 19 C. 312, F. and 9 O.C. 301, R.

Deposit.

—by stranger on behalf of judgment-debtor to set aside sale—Order setting aside sale reversed on appeal—Right of decree-holder to attach deposit money. See CIV. PRO. CODE, No. 205, 18 C.W.N. 100.

Desertion.

Husband deserting and abandoning his wife—Lapse of time—Husband not entitled to claim custody of wife. See RESTITUTION OF CONJUGAL RIGHTS, No. 2, 82 P.R. 1908.

Devise.

—, power of, amongst Shi'ah Mahomedans—Extent—Validity. See MAHOMEDAN LAW (WILL), No. 1, A.W.N. (1908), 55

Digwari tenure.

- (1) *Minerals, right to—Digwari Jagir of—Maubhum, nature of—Moharari lease of all surface and sub-soil rights granted by Digwar—Government, consent of—Government, rights of—Landlord, rights of—Sanharari jara settlement—Government, if a necessary party—Constructive possession—Wrong-doers or trespassers—Limitation—Ejectment—Digwari tenure, if analogous to Ghatwali tenures—Digwar, right of, character of—Resume of the history and law on the subject—Resumption of tenure*

The circumstances that the *Digwar* has all along been responsible to Government for the due discharge of his duties, that the appointments to and dismissals from the office have been all along made by Government and that the (*Digwari*) tenure has passed to the persons whom Government has appointed, show that the holder of the tenure is not a servant under the landlord responsible to him for the due collections of the rent of the estate, and that he did not hold the tenure as a simple *rajdar* under the landlord responsible to him for the rents of the tenure and receiving as his remuneration only the *man* lands.

The *Digwari* tenure is an ancient and hereditary tenure held subject to the payment of a fixed rent to the landlord, and on condition of the performance of certain police or public ser-

Digwari tenure—(Continued).

vices, for the due discharge of which the holder has been responsible to the Government, which alone has exercised the power of appointment to or dismissal from the office.

The Government having all along asserted a right in the *Digwari mouzaks* on the ground that they are public service lands, and in granting permission to the *Digwar* to lease out the property, subject to the condition that the settlement was to be made without prejudice to the rights of Government, the same position having been maintained by Government, without any objection having been raised by the landlord, and the landlord having advanced an exclusive right to the sub-soil profits, in which the Government has a substantial interest as affecting the profits derivable from the tenure, the Government is, in a suit brought by the landlord for a declaration that the sub-soil belongs to him and not to the *Digwar* or his lessee a necessary party (a)

Constructive possession applies only in favour of a rightful owner and need not (as a rule) be extended in favour of a wrong-doer, whose possession must be confined to land of which he is actually in possession (b)

Occupation by a wrong-doer of a portion of land only cannot be held to constitute constructive possession of the whole so as to enable him to obtain a title by prescription.

Where the right to the sub-soil coal has not been asserted by the *Digwar* openly to the knowledge of the landlord for more than the statutory period of twelve years, though there may have been no concealment that the *Digwar* has been working the coal, a suit by the landlord for the sub-soil cannot be held to be barred by limitation (c).

The enactments dealing with the Ghatwals of Burbhun are not of the nature of private statutes.

A clear distinction must be drawn between the grant of an estate burdened with certain duties and the grant of an office, the performance of whose duties is remunerated by the use of certain lands; and a further distinction must also be drawn between a grant for services of public nature and one for services, private or personal to the grantor. The former class of grants in such instance are liable to resumption by the grantor, while the latter class are not so liable (d).

The *Digwari* tenure having been created in the first instance to enable the holder to dis-

Digwari tenure—(Continued)

charge public duties, and it all along having been so regarded, it is not liable to resumption by the landlord.

The position of the *Digwar* is analogous to that of the *Ghatwals* in Birbhum and the *Digwar* having been recognized throughout as possessing the same rights, it must be held that the immural rights in the tenure do not belong to the zemindar (e).

The tenure was created as a permanent tenure on a fixed rent and was heritable, the zemindar reserving only a fixed quit-rent (f).

The *Digwar* as holder of a permanent tenure possesses all underground rights including mining rights, unless there is an express reservation to the contrary (g) **Brojo Nath Bose v. Raja Sri Sri Durga Persad Singh**, 5 C L J. 583 = 34 C 753 = 12 C.W.N. 193.

BURFIT AND SHARELDDIN, JJ.

References —(a) 21 B. 229; 44 Ch D. 374, *Disgd.*; 13 B L R. 118, 22 W.R. 52, 5 C.L.R. 154, *It* (b) 24 C. 256, *R.* (c) 31 C 397, 19 W.R. Eng 444, 6 Ch D 719; 1 Ch and Inf. 8, *R.* (d) 13 Moo I A. 438 (463); 22 C. 938 (941), *R.* (e) 5 C. 389 on appeal 9 C. 187, *R.* (f) 22 C 533 (543); 11 M I A. 433 (466), *R.* (g) 3 C.L.J. 59, *P.*, 3 C L J. 306, 33 C. 203 (215), *R.*, 9 C.W.N. 292 and 2 C.L.J. 20, *D*

(2) *Service tenure—Resumption—Digwars of Ramgurih—Dismissal by Government and re-settlement with them as sikim talookdars—Default, proof of—Act VIII, B.C. of 1878, settlement under—Effect.*

The *Digwari* service in this case corresponded closely with what in other cases have been termed *ghatwalli*. There is nothing in the use of the term *Digwar* to raise any presumption in favour of the contention that the holders of land by a service so named hold as personal servants of the Rajah. If anything, the presumption would seem to be the other way.

The power of Government although generally exercised through the Rajah was always recognised as supreme with respect to the supervision over the *Digwars* in regard to the discharge by them of their police duties. The Rajah of Ramgurih never possessed or exercised a right to dismiss the *Digwars* and to resume the *Digwari* grants, save in cases of default, and by the terms under which persons held *Digwari* grants, no such power was given or reserved to the Rajah

Digwari tenure—(Concluded).

The dismissal by Government of the *Digwars* and the substitution for them of a new system of rural police supposed to be of superior quality did not entitle the Rajah to resume the lands as for default.

The subsequent settlement of the lands by Government, purporting to act under Act VIII B.C. of 1878, with the dismissed *Digwars*, treating them as *Sikim* talookdars, and imposing on them assessments for road and police purposes of an amount far beyond the burden, which previously rested on the holdings in the shape of supplying patrols, amounted to a continuance, in the form imposed by statute, of their public duties. There was no default. **Nam Narain Singh v. Tekait Ganjhu**, 12 C.W.N. 178.

PIGOT AND BEVERLEY, JJ.

Diligence

Effect of—*in suing*. See PRE-EMPTION, No. 20, 20 P R 1908.

Discretion

(1)—Judge refusing to hear pleader, not named in vakalatnamah appearing for another who is ill—Application for adjournment by junior not instructed to argue refused—Discretion wrongly exercised—Proper course under circumstances. See ACT X OF 1859 (BENGAL RENT RECOVERY), No. 1, 7 C L J. 426

(2)—must not be arbitrary—The term imports exercise of judgment. See ACT III OF 1888 (CITY OF BOMBAY MUNICIPALITY), No. 1, 10 Bom. L R. 821

Dismissal of suit.

—for default of appearance—No appearance by Counsel—Sufficient cause for setting aside order of dismissal. See CIV. PROC CODE, No. 88, 10 Bom L R 904

Dispossession.

—of judgment-debtor's tenant by auction-purchaser on obtaining delivery of possession under S. 318, C.P.C., whether in due course of law. See SPECIFIC RELIEF ACT, No. 2, 12 C.W.N. 694.

Dissolution of marriage.

(1)—, delay in presenting and prosecuting petition for—Satisfactory explanation to be given for delay—Failure to do so—Effect. See ACT IV OF 1869 (DIVORCE), No. 3, 12 C.W.N. 1009.

(2)—See DIVORCE.

District Court.

Meaning of the term—in S. 29 of Inventions and Designs Act. See ACT V OF 1888 (INVENTIONS AND DESIGNS), No. 1, 12 C.W.N. 446.

Division Bench.

—of High Court making reference to Full Bench—Chief Justice refusing to constitute the Bench—Power of Division Bench to rehear case. See CIV. PRO. CODE, No. 142, 5 A.L.J. 285.

Divorce.

(1) Suit by wife for dissolution of her marriage with husband under S. 10—Husband not appearing at the hearing—Husband committing adultery after last condonation of former adultery and cruelty—Effect. See ACT IV OF 1869 (DIVORCE), No. 2, 14 Bur. L.R. 173.

(2) Adultery of the petitioner is a legal ground on which the Court can refuse the petition for divorce. See ACT XV OF 1865 (PARSI MARRIAGE AND DIVORCE), No. 1, 10 Bom. L.R. 1019.

Divorce Act.

--See ACT IV OF 1869

Documents

—not mentioned in list annexed to plaint—Failure to produce at trial—Discretion of Court under S. 149, Civ. Pro. Code to reject—Duty of Court in exercising such discretion—Intention of section, not to shut out formal evidence of documents beyond suspicion, but to prevent fraud—Plaintiff need not produce documents relied on but not filed with plaint unless called on by Court. See CIV. PRO. CODE, No. 100, 12 C.W.N. 312.

Dower

(1) Claim for dower, whether can be included in a suit for inheritance. See CASE OF ACTION, No. 1, 11 O.C. 69.

(2) Succession to unpaid dower of deceased female among Mahomedan Rajputs of Ludhiana District—whether governed by Mahomedan Law or custom. See CUSTOMS (PUNJAB) INHERITANCE AND SUCCESSION, No. 3, 43 P.R. 1908.

Durbanga Raj.

Babuana grant—Mortgage by grantee—Legal necessity—Alienability—Ancestral property. See BABUANA GRANT, No. 1, 12 C.W.N. 966.

Easements.

(1) *Ancient rights—Substantial interference—Nuisance—Reflected light—Mandatory injunction, refusal of—Delay—Damages.*

Easements—(Continued).

The right of the owner of the dominant tenement is a right to the reception of light and air in a lateral direction; but to constitute an actionable obstruction, the same must amount to a nuisance.

The question, that has to be decided, is not how much light is left in spite of the obstruction, but whether there has been such a diminution of light as to constitute an actionable nuisance (a).

Where it was urged that, although the natural light coming into the dominant tenement had been diminished, the reflected light had increased with the result that the rooms were better lighted than before, but it was admitted that if the building was raised, the light coming into the building would be seriously affected.

Held, that the right of the dominant owner (to light) should not be made dependent on his refraining from exercising his undoubted right of raising the height of his building, there was thus a substantial interference with his rights. **Anath Nath Deb v. J.C. Galstaun**, 12 C.W.N. 519 = 35 C. 661.

FLETCHER, J.

References.—(a) (1904) A.C. 179, F., 2 Q.B. 722, R.

(2) *Light and air—Interim injunction—Quia timet action*

There are two necessary ingredients for *quia timet* action. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will be very substantial or irreparable.

Gangabai v. Purshotum Atmaram, 9 Bom. L.R. 912 = 32 B. 146.

MACLEOD, J.

(3) *Easement of necessity, how arises—Claim to take plough and water through another's land—No allegation of severance—Imitation Act, S. 26, Cl. 2.*

Easements may arise in several ways. One of these ways is by implied grant. Upon severance of heritage into two or more parts a grant may be implied of all those easements without which the enjoyment of the severed portions could not be had at all, and this class are usually termed easements of necessity.

An easement of necessity cannot arise in any other way than on severance of tenements (a).

Easements—(Continued).

Where a person claims the right to take plough and water through another's land, and there is no allegation of severance, such a claim can only be based on S. 26, cl. 2 of the Limitation Act (b). **Po Kin v. Maung La**, 4 L.B.R. 246.

IRWIN, O.C.J.

References —(a) 2 M. 46; Gale on easements 7th Ed., p. 96, f' (b) 2 L.B.R. 134, R.

(4) *Ancient light—Easement, non-user of, how far a release—Transfer of dominant tenement—Alienation of easement after attachment—Code of Civ. Pro. (XIV of 1882), S. 276—Lucense—Damage—Mandatory injunction.*

The non-user of an easement is not an implied release of it, and the transfer of the dominant tenement carries with it the easement which then existed, although in suspense for the time being.

The easement of light and air falls within the definition of immoveable property and can be extinguished by the dominant owner releasing it, expressly or impliedly, to the servient owner.

If an easement enjoyed by the dominant tenement is expressly released, after the latter is attached under a decree, it is an alienation of a portion of that property within the meaning of S. 276 of the Code of Civ. Pro. (XIV of 1882), and the transaction will be void.

Merely blocking up of the apertures of ancient windows would not necessarily amount to an abandonment of rights of easement. **Krishna Dhone Mitter v. Nandaranee Dassee**, 12 C.W.N. 969—35 C. 889.

CHITTY, J.

(5) *Riparian owners, upper and lower—Relations between such regarding right to use of river water—Upper riparian owner acquiring easement to irrigate his land—Limitation Act, S. 26—Sch. II, Art. 47—Custom—Vicinity.*

An upper riparian owner can acquire an easement apart from the mode of acquisition mentioned in S. 26 of the Limitation Act (a). But, if he relies on custom, he must prove that it was ancient, continuous, peaceable, reasonable, certain, compulsory and consistent with other customs regarding the right to irrigate from the river.

Riparian owners claiming a right to the extraordinary use of water, i.e., to irrigate their village lands from the water of a river running

Easements—(Concluded).

through their village by putting up dams therein, must not interfere with the rights of the lower riparian owners (b). Any such interference would be unreasonable and inconsistent with the rights of others. It can be allowed only in pursuance of some arrangement arrived at between the parties interested, or as entailed by the successful acquisition of a prescriptive right (c).

When a suit is not one to recover any property, but one for a declaration of the plaintiffs' right to put up dams in a river and to irrigate their lands by means of such dams, Art. 47 of Sch. II of the Limitation Act has no application. **Eshan Chandra Samanta v. Nil Moni Singh**, 35 C. 851.

CASPERSZ AND SHARFUDDIN, JJ.

References —(a) 6 C. 394 (409), R. (b) 12 Moo. P.C. 131 (156), 7 H.L., 697 and (1904) A. C. 301, R. (c) 29 C. 100 (110), 24 C. 865 (P.C.) = 24 L.A. 60, R.

(6) *Way, right of—Implied grant—Alternative defences—No objection—No prejudice.*

No grant of an easement can be implied from a defendant using a land for eight years without any objection on the part of the plaintiff.

Per Mookerjee, J.—There is no implied reservation of an easement in case one transfers a part of his land over which he has previously exercised a privilege, in favour of the land he retains, unless the burden is apparent, continuous and strictly necessary for the enjoyment of the land retained (a).

Implication of a grant of easement, upon the severance of a tenement, extends to a way which is a formed or metalled road.

It is open to a defendant to set up alternative defences e.g., to set up as a defence, that he was the owner of the property in dispute and if he was not the owner, he had a right of easement over it (b).

A plaintiff will not be allowed to raise any objection as to the defendant's setting up alternative defences, at the appellate stage of the suit, when no such objection was raised in the Court of first instance, and it was not shown that he was in any way prejudiced (c). **Purnendu Narain Roy v. Dwijendra Narain Roy**, 8 C.L.J. 289.

MACLEAN, C.J., AND HOLMWOOD, J.

References —(a) 4 Dec. Gex. J. & S. 185=46 E.R. 888; 12 Ch. D. 31; 25 Ch. D. 559; 26 C. 811, R. (b) 4 C.L.J. 497=34 C. 51, App. (c) 4 C.L.J. 367, R.

Easements Act (V of 1882).

- (1) *S. 1—Right to water whenever water was sold to the owner of the servient tenement by the Government.*

Where it was found that the plaintiff had the right to take water to his own land through a channel on the defendant's land whenever the water was sold to him by Government, it was held that the right amounted to an easement within the definition of S. 1 of the Act. **Tiruvenkatachar v. N.Y. Desikachar**, 4 M.L.T. 414

MUNRO AND ABDUR RAHIM, JJ.

Ejectment.

- (1) *Suit for—Notice to quit—Tenant-at-will—Agricultural holding—Transfer of Property Act (IV of 1882), S. 108, cl. (7)—Trespasser, notice addressed to tenant as, if legal*

The incident of non-transferability was common to tenancies from year to year of homestead lands and agricultural lands, created before the passing of the Transfer of Property Act, in the absence of a custom to the contrary (a).

A notice addressed to a tenant, not as a tenant but as a trespasser, giving him six months' time to quit, even if the tenancy was created after the passing of the Transfer of Property Act is a good notice, and the defendant is bound to quit the land in accordance with such notice. **Ram Charan Naskar v. Hari Charan Guha**, 7 C.L.J. 107

RAMINI AND MOOKERJEE, JJ.

References —(a) 4 C.W.N. 574 and 32 C. 1023, F.

- (2) —(Onus—Tenure-holder—Tenure, non-permanent if transferable—Transfer of Property Act (IV of 1882), S. 2, effect of—Bengal Tenancy Act (VIII of 1885), S. 11

In a suit in ejectment where the defence sets up a tenure by right of purchase from the former tenant, if the plaintiff has proved that he is the owner of the land, it lies upon the defendant to make out that he is a tenure holder and is entitled to remain thereon.

The provisions of the Transfer of Property Act do not apply to a tenancy created before the Act came into force. A non-permanent tenure created before the passing of the Transfer of Property Act is not transferable (a)

Ejectment—(Continued).

Semble —S. 11 of the Bengal Tenancy Act imports that non-permanent tenures are not to be regarded as transferable. **Hiramoti Dassya v. Annoda Prosad Ghosh**, 7 C.L.J. 553.

MACLEAN, C.J., AND COXE, J.

References :—(a) 2 C.W.N. 122 and 32 C. 1023, F.

- (3) *Suit for—Sub-lease, grant of, by tenant—Central Provinces Tenancy Act (XI of 1898), S. 46, sub-sec. (3).*

Under the Central Provinces Tenancy Act, none but an occupancy tenant can be ejected from his holding for granting a sub-lease. **Sadasib Jhemkir v. Jala Gaontia**, 8 C.T.J. 156

CASPERSZ AND SHARFUDIN, JJ.

- (4) *Plaintiff entitled to a share only of joint property—Suit for ejectment—Whether suit can be treated as for partition.*

The plaintiff sued on the allegation that the suit property, a house, was the sole property of his vendors, the defendants 1 and 2. But it was found that it was not their sole property.

Held, that the suit, as framed and as tried, being one for ejectment against the third defendant as a trespasser, should not be treated as a suit for partition between co-owners, the latter being a suit of a different character and for a different relief. **Saminadha Padayachi v. Rangasawmy Naicken**, 4 M.L.T. 215.

BENSON AND MILLER, JJ.

Reference .—10 B. 451, F.

- (5) *Suit for—Onus of proof—Presumption—Permanency of holding—Confirmatory potta.*

Where the plaintiff claims to eject the defendants from the land on the ground that they are merely tenants-at-will, the onus lies on the defendants to substantiate that they have a permanent interest in the land.

The absence of words importing the hereditary character of the tenure may be supplied by the evidence of long and uninterrupted enjoyment, and of the descent of the tenure from father to son, where that hereditary character may be legally presumed (a).

In a case where the following facts were found, *viz.*, the possession at a uniform rent for some hundred years, the property descending from father to son, various transfers, many of them

Ejectment—(Continued).

recognised by the landlord, the erection of *pucca* buildings, the improvements at much cost, and all this with the knowledge of the landlord's agents, and no attempt to eject or to enhance the rent for all those years, the presumption of the permanency of the holding may legally be made.

A permanent tenancy is not destroyed by the acceptance by a purchaser of the holding of a mutation *potta* containing no express words importing the permanency of the holding.

The words "mutation is being made in substitution of the heirs of Bhagwan" in the mutation *potta* mean that the *potta* was executed not for the purpose of destroying the old permanent tenure and creating a tenancy-at-will, but simply with the object of effecting a mutation of names in the proprietor's *sherista*.

Where a mutation *potta* refers to an old *potta* creating a permanent holding, for the purpose of showing a proportionate rent and treats the taker as the then existing tenant and not as a new tenant by virtue of that *potta*, that *potta* is a confirmatory one. **Ismail Khan Mahomed v. Nani Gopal Mukerji**, 8 C. L. J. 513.

MACLEAN, C. J., AND GEHDT, J.

References:—(a) 10 M. I. A. 183 (191)=3 W. R. 1 (P.C.), 2 B. L. R. (P.C.), 23=12 M. I. A. 263=11 W. R. 10 (11) (P.C.), F.

(6) *Plaintiff alleging defendants to be in permissive occupation of his land—Defendants denying it and asserting adverse possession—Permissive occupation important question—No finding by appellate Court on it—Remand of appeal—Civ. Pro. Code, S. 574—Improper judgment.*

The plaintiff sued for the ejectment of the defendants from a piece of land, on the ground that the defendants were in permissive occupation of it, having been permitted by his father to live on it. The defendants denied that the land ever belonged to the plaintiff's father and pleaded that the land was abandoned village land, which they occupied some 20 years before the suit was brought. The plaintiff got the decree he prayed for in the Township Court.

The important question to be decided in this case was, whether the defendants' possession was permissive or not. If the plaintiff has proved that it was, the burden of proof lies on defendants to prove that they have had 12 years' adverse possession; if, on the other hand, the

Ejectment—(Continued).

plaintiff has not done so, the burden of proof lies on him to prove possession within the 12 years preceding the suit. The District Judge had come to no finding on the point. He did not state that the Township Judge's decision was wrong, but merely that it was questionable. The Chief Court reversed the decree of the lower appellate Court and remanded the appeal for rehearing and a fresh decision on the grounds of appeal and points at issue and for a judgment in accordance with law (a) observing that, where the District Judge had not definitely found adversely to the Township Judge on a question of fact and had given no reason for his decision on the point at issue, it was not within the province of that Court to come to a finding on the question.

The general rule of law seems to be that, where the suit is for possession and the cause of action is dispossession, the plaintiff is bound to prove possession and dispossession within 12 years, or, in other words, the plaintiff must show, not only that he has a title, but that he has a subsisting title, which he has not lost by the prescriptive section of the Limitation Act.

Held, that, in the present case, therefore, it was for the plaintiff to show that the land in dispute belonged to his father, and the defendants were permitted by his father to live on it. In such a case, the defendants would not be in adverse possession, until they refused to quit, when asked to do so, and the burden of proof would lie on the defendants to show that they have had 12 years' adverse possession. If, on the other hand, the plaintiff has not proved that the land was his father's and that the defendants were allowed by his father to live on it, he must lose his case.

There is the third contingency, and, that is, if the plaintiff has proved that the land belonged to his father, but has not proved, that the defendants were permitted by his father, to live on the land. In this case, circumstances remained unexplained as to how the defendant came into possession, and if the possession of defendants under such unexplained circumstances exceeds 12 years, the plaintiff must lose. In this third contingency, the burden of proof lies on the plaintiff to show that the defendants have not been in possession for 12 years, but on the other hand, that he or his predecessor, has been in possession within the 12 years next preceding the suit (b).

Ejectment—(Concluded).

The District Judge on appeal wrote.—Defendants " appeal against this decree on many grounds, including a plea that, if they are turned out from here, they will have nowhere to go and live. The only questionable part of the Township Judge's decision seems to me to be the finding that appellants' possession was adverse. With the rest, I am in complete agreement and I dismiss this appeal with costs "

Held, that this judgment was not a sufficient compliance with the express provisions of S 574 of the C.P.C. **Maung Kyaw Zan Hla v. Maung San Nyun**. 14 Bur L R 156

HARTNOLL, J

References —(a) 11 Bur L R 59, P (b) 16 C. 473, P

(7)—, suit for—Cultivating riyat—Occupancy right, in what land accrues—Bengal Tenancy Act (VIII of 1885), S. 21. See LANDLORD AND TENANT, No 9, 7 C L J 475

(8)—, suit for—Denial of relation of landlord and tenant—Setting up third party as landlord in a previous rent suit—Putting an end to tenancy by joint lessors—Transfer of Property Act, S 111. See LANDLORD AND TENANT, No 11, 7 C L J 483

(9) Suit for ejectment—*Nij-jute* land, suit for possession of—Makarruridai—Occupancy riyat, plea of—Omnis of proof See BURDEN OF PROOF, No. 3, 8 C L J 170

(10)—Action for—plaintiff to prove title and actual or constructive possession within 12 years of suit See POSSESSION, No 2, 12 C.W.N. 273

Elephant

—domesticated—Escape and re-capture—Property of original owner, when ceases See ANIMAL, No. 1, 10 C.W.N. 547.

Endowment.

(1) *Deed—Construction—Charitable purposes—Not void for vagueness—Parties—Persons interested, not being upon the record—Effect of.*

Where a deed of endowment recited that the executant had established a *dharamshala* for charitable purposes and he had carried on the charity: *held* that the trust was not void for vagueness. A trust for such purposes, that is, charity generally, will always be carried out, notwithstanding that the objects of the charity are not specifically defined. (a)

Endowment—(Concluded).

Where the Court finds a properly constituted trust, the fact that the trust was not carried out would not have the effect of annulling it.

Where the plaintiffs in a suit ask for possession in the character of trustees of certain endowed property and omit to implead persons interested in a particular item of that property, they cannot in that suit obtain a decree declaring that property subject to the charge of maintaining the trust. **Gordhan Das v. Chunni Lal**, 5 A.L.J. 23—A.W.N. (1908), 34—30 A 111

STANLEY, C.J., AND BURKITT, J.

Reference (a) 23 B. 725, D

(2)—See RELIGIOUS ENDOWMENTS

(3)—See TRUSTS

Enfranchisement

Transfer of main land—Reg VI of 1891—Effect of subsequent enfranchisement See INAM, No 2, 3 M L T 243.

Equity of redemption.

—purchased by a mortgagee from one of the heirs of the mortgagor, effect of See MORTGAGE (GENERAL), No 9, 12 C.W.N. 745.

Estates Partition Act.

—See ACT V OF 1897 (BENGAL)

Estoppel.

(1) *Representation by a widow that she was competent to adopt—Evidence Act (I of 1872), S. 115—Adoption—Adopted son borrowing money and incurring other expenses on faith of representation—Subsequent denial of authority to adopt.*

Where a widow represented that she had authority to adopt, and the ceremony of adoption was carried out on the faith of this representation, the marriage of the adopted son was celebrated by the adoptive mother, the adoption was then challenged by a reversioner and the adopted son in order to defend his right incurred heavy liabilities, *held*, that the adoptive mother was estopped from maintaining a suit for a declaration that she had no authority to adopt (a) **Dharam Kunwar v. Balwant Singh**, 5 A.L.J. 568—A.W.N. (1908), 231—4 M L.T. 385.

STANLEY, C.J., AND BANERJI, J

References —(a) 15 M 486, 11 B. 381; (1894) M 397; N.W.P.H.C.R. 103 (1868); A.W.N. (1882), 97; 2 A 366; 20 C. 296 (311), R.

Estoppel (Continued).

(2) *Partition decree—Mortgagee, not made a party—whether binding on mortgagee—Findings in judgment—Mortgagee taking advantage of—Estoppel, mutual.*

The judgment and decree in a suit for partition, to which a prior mortgagee is not made a party, are not binding upon the mortgagee (a).

The mortgagee in such a case cannot take advantage of any finding in the said judgment. The estoppel must be mutual (b) **Surja Prosad Thakur v. Rajmohan Topedar**, 8 C L.J. 478

Doss, J.

References—(a) (1) 12 W.R. 362; (2) 4 C. 692, (3) 8 A. 324; (4) 22 C. 364, (5) 152 U.S.R. 301; (6) 130 Fed. Rep. 152; (7) 121 Fed. Rep. 874; (8) 75 Fed. Rep. 929, (b) 19 W.R. 114, *relied upon*.

(2-a) *Fraud—Misrepresentation—Undue influence—Defendant relying on representations made by plaintiff—Estoppel by conduct—Relief in equity, conditions for seeking.*

Suit for possession by partition of a third share of the property left by B, who died on 20th October, 1900, leaving him surviving, an uncle, two cousins, and three sisters. The uncle, the plaintiff in the suit, took possession of the deceased's estate and managed it. On the 25th July, 1901, an agreement was executed by the plaintiff and by the mothers of the two minor defendants, who were defendants 1 and 2 in the suit, appointing D, third defendant, an arbitrator for adopting Bhagat Ram, whom, according to the agreement, B had, during his lifetime, nominated to be appointed as his adopted son. This nomination clause was subsequently added at the plaintiff's request and was attested by him. On the 27th July, 1901, D, arbitrator, gave his award in pursuance of the agreement of reference, dated 25th July. It was stated in the award that, according to the desire expressed by B, deceased, during his lifetime, his cousin, Bhagat Ram, was made his adopted son, and further provisions were made, setting apart funds for charitable purposes, for marriages of minor sisters of B and fixing maintenance for the plaintiff and others as required by the reference. A deed of release was executed on the same date and registered along with the award on 30th July, 1901, whereby the plaintiff and the other reversionary heirs of B acknowledged Bhagat Ram as his adopted son,

Estoppel—(Continued).

and agreed to abide by the settlement made by the arbitrator, relinquishing all claim to the estate of B in favour of Bhagat Ram, his adopted son. There was at the same time executed and registered an agreement by the mother of Bhagat Ram, (his father being then admittedly a lunatic), giving Bhagat Ram in adoption as desired by B, when alive, and a power of attorney, appointing D as a general agent for managing business. The next day, i.e., on 31st July, the plaintiff wrote a letter handing over possession, to D, of the estate as detailed therein and of which the plaintiff had hitherto held possession as a manager and heir. On 26th July, 1904, the plaintiff sued alleging that D, third defendant, having represented that he would partition the estate of D among his heirs, including the plaintiff, got an agreement of reference for that purpose executed in his own favour but taking advantage of the confidence reposed in him as a relative and of the youth and ignorance of the plaintiff, he executed and registered an award contrary to the purport of the agreement, and further fraudulently caused the plaintiff to execute a deed of acquittance in favour of the first defendant without any consideration. There was no direct proof to support the allegation of misrepresentation and fraud made in the plaint, nor that the plaintiff was induced to execute the document in question by any undue influence exercised over him by D.

Held, that there was absolutely nothing in the relative circumstances of the parties to induce a belief that the plaintiff was duped by a false representation, or that an unfair advantage was taken of his youth and ignorance as alleged in the plaint, that plaintiff could not resile from the position deliberately adopted by him in 1901 as he was met, not only by the adoption he acknowledged, but by his own release, and he could not get over these obstacles without proving misrepresentation, fraud and undue influence as alleged (a), and that the plaintiff, therefore, was clearly estopped (b) from disputing the adoption, since he had himself encouraged and concurred in it.

When a plaintiff attempts to set aside certain deeds executed and registered by him on the ground of fraud, undue influence or misrepresentation, he ought to make a specific allegation on which he relies. The defendant is called upon to meet only the case as alleged, and if the plaintiff fails to substantiate his allegation or to make some specific charge, his case is bound

Estoppel—(Continued).

to fail and to be dismissed. **Bhagat Ram v. Gokal Chand**, 150 P.R. 1908.

KENSINGTON AND LAL CHAND, JJ.

References :—(a) 23 C. 15 (P.C.); L.R. 23 Ch. D, p. 278; 1 Chit. R.R. 119; L.R. 2 Ap. Ca. 815 and 4 L.A. 31, R. (b) 25 C. 662; 15 M. 486 and 18 M. 307, R.

(3)—, whether, arises preventing plaintiff from bringing suit for ejectment against defendant, by reason of plaintiff's having previously brought a rent suit against him—S. 16, Act VIII of 1865—Plaintiff's power to avoid incumbrances to eject refractory tenant See ACT VIII OF 1865 (BENGAL RENT RECOVERY), No. 1, 7 C.L.J. 191.

(4) Consent decree—Agreement between widow and her husband's brothers—Widow taking absolute estate in consequence—Suit by brothers as reversioners to recover property after her death—Reversionary heirs estopped by arrangement made by them with widow. See HINDU LAW (REVERSIONERS), No. 2, 10 Bom. L.R. 210.

(5) Whether estoppel by false statement arises where both parties know truth regarding matters stated. See MORTGAGE (FORECLOSURE), No. 2, 4 N.L.R. 28.

(6)—Plea of, against minor. See GUARDIAN AND MINOR, No. 3, 12 C.W.N. 481

(7) Rule underlying S. 43, Transfer of Property Act—An extension of the rule of. See TRANSFER OF PROPERTY ACT, No. 7, 7 C.L.J. 381.

(8) Suit by puisne mortgagee to redeem prior mortgage—Estoppel by defence raised in previous case See MORTGAGE (REDEMPTION), No. 10, 10 O.C. 193 = 12 C.W.N. 515 (P.C.)

(9) Defendant not objecting to the admission of secondary evidence at the time of filing—Right to raise the objection in argument. See EVIDENCE, No. 1, 3 M.L.T. 297.

(10) Release by reversioners in favour of a Hindu widow—Subsequent alienations by widow, how far binding on next reversioners—Participation in consideration for release. See HINDU LAW (REVERSIONERS), No. 4, 3 M.L.T. 355.

(11) Vendor's lien for unpaid purchase-money—Sale-deed containing full payment of purchase-money—Acknowledgment by vendor to the same effect—Vendor parting with title-deeds relating to property—Effect. See SALE, No. 1, 10 Bom. L.R. 403.

Estoppel—(Continued).

(12) Landlord purchasing non-transferable occupancy holding in execution of money-decree, whether estopped from setting up non-transferability as defence in a suit by a prior mortgagee. See OCCUPANCY HOLDING, No. 1, 12 C.W.N. 72.

(13)—, when silence will operate as an. See REG. VIII OF 1819 (PUTNI), No. 3, 7 C.L.J. 604.

(14) Pre-emption—Plea that a sale was in reality a gift—Estoppel, belief in the representation, necessary for. See PRE-EMPTION, No. 2, 11 O.C. 176.

(15) Suit for annuity—Defendants denying plaintiff's title—Previous suit between same parties for arrears in Revenue Court—Decision of Revenue Court operates as *res judicata*—Defendant estopped from re-opening question—Right of plaintiffs to receive annuity. See CIV. PRO. CODE, No. 15, 5 A.L.J. 407.

(16) Execution of decree—Previous application barred—Notice on judgment-debtor—Estoppel. See EXECUTION OF DECREE, No. 17, 8 C.L.J. 193.

(17) Whether a promise can by itself be foundation of estoppel—Effect of recital in a deed in an action collateral to it and not founded on the deed. See TRANSFER OF PROPERTY ACT, No. 3, 11 O.C. 301.

(18)—by conduct—Sale in execution of a money-decree—Property subject to a mortgage, but not mortgage executed by the judgment-debtor—Judgment-debtor would himself have been estopped from denying liability under mortgage owing to his conduct in mortgage transaction. See DECREE, No. 6, 35 C. 877.

(19) Pedigree accepted by Court of first instance as proved—Appellate Court considering evidence of pedigree worthless—Whether plaintiffs were estopped from seeking to sustain first Court's finding in their favour—Appeal. See HINDU LAW (SUCCESSION), No. 9, 13 C.W.N. 1 (P.C.).

(20)—against minor—False and fraudulent misrepresentation by minor—Principles of liability. See CONTRACT ACT, No. 2, 5 A.L.J. 674.

(21) Tenant building on Zemindar's land—Abstention of Zemindar's agent—Whether estoppel arises. See LANDLORD AND TENANT, No. 28, A.W.N. (1908), 282.

(22) Execution of decree for rent due—Third person's property unintentionally sold in execu-

Estoppel—(Concluded).

tion—Plaintiff omitting to notify that goods were his—Plaintiff's conduct no estoppel. See **TORT**, No. 5, 129 P.R. 1908.

(23) Suit for redemption—Previous suit for possession—Account filed therein—Estoppel. See **MORTGAGE (REDEMPTION)**, No. 4, 10 Bom. L.R. 126 (P.C.).

(24) Whether mere silence or delay in suing without any overt act or omission calculated to mislead, creates estoppel. See **LIMITATION ACT**, No. 67, 5 P.W.R. 1908.

Evidence.

(1) *Court-copy of title-deed—Secondary evidence—Objection not raised at the time of filing—Estoppel.*

A Court-copy of a title-deed was filed without objection on behalf of the plaintiff but objection was taken during the argument that the plaintiff had not shown any of the statutory grounds for the admission of such secondary evidence.

It was held that the defendant's allowing the copy to be marked without objection would not estop him from afterwards objecting to it.

The copy should not have been marked until evidence had been given which made it receivable. **Kistna Doss v. Muktamala Santani**, 3 M.L.T. 297.

WALLIS AND SANKARAN NAIR, JJ.

(2) *Khasra, admissibility of entries in remarks column of.*

Held, that entries made by the Patwari in the remarks column of the *Khasra* are admissible in evidence (a). **Khalil-ur-rahman v. Sripal Singh**, 11 O.C. 195.

CHAMBER, J.C.

Reference :—(a) 3 O.C. 204, R.

(3) *Practice—Evidence—Documents—Privilege attaching to documents—Such documents to be properly described for identification—Documents passing between a company and its officials after threatened suit not per se privileged.*

The defendants are bound to describe the documents, for which they claim privilege, sufficiently for the purpose of identification to enable the Court to order their production should the Court think right to do so (a).

In a suit against a Railway Company, the papers which passed between the company and

Evidence—(Continued).

its officials relating to the subject matter in dispute since the plaintiff threatened a suit are not by nature privileged. If privilege is claimed for any of them, the grounds thereof should be clearly set forth in the affidavit. **Nemchand Manaji v. R.D. Sethna**, 10 Bom. L.R. 796.

MACLEOD, J.

Reference :—(a) *Bewicke v. Graham*, 7 Q.B. 11, 400, F.

(4) *Death-bed attentions—Funeral expenditure—Evidentiary value—Claim for inheritance.*

In dealing with claims to inheritance, unless it can be shown that the ordinary duties of affection or kindred have been intentionally and deliberately neglected, so as to raise a presumption of the rupture or interruption of the connecting bond, evidence referring to particulars of death-bed attentions or expenditure on the funeral obsequies may generally be passed over as of little or no importance (a). **Maung Sein v. Maung Kywe**, 4 L.B.R. 291.

ORMOND, C.J., AND IRWIN, J.

Reference :—2 U.B.R. (1892-1896), 184, F.

(5)—Oral, admissibility of, to show that person signing bond signed both for himself and as agent of his partner. See **EVIDENCE ACT**, No. 19, 18 M.L.J. 1.

(6) Unstamped document alleged to be in the possession of defendant—Secondary evidence, whether admissible. See **STAMP ACT (1 of 1879)**, No. 1, U.B.R. (1907), 4th Quarter, Execution-Signing, 5.

(7) Secondary evidence—Suit on promissory note alleged to have been lost—Loss to be proved before secondary evidence can be given of its contents. See **EVIDENCE ACT**, No. 17, 5 A.L.J. 162.

(8) Sale certificate if necessary to be filed in suit for establishment of title by auction-purchaser—Decree against landlord, if admissible in evidence against the tenant. See **SALE CERTIFICATE**, No. 1, 7 C.L.J. 384.

(9) Additional evidence on appeal, when admissible. See **CRV. PRO. CODF.** No. 323, 3 M.L.T. 808.

(10)—to prove local usage of transferability of occupancy holding—Transferee allowed to hold and pay rent as *marfatdar*—Mutation of names on payment of *selami*—Effect. See **LANDLORD AND TENANT**, No. 8, 12 C.W.N. 539.

Evidence—(Continued).

(11) Admissibility of oral, between parties to a suit or their representatives in interest to prove that a deed purporting to be a mortgage was intended to be a sale. See EVIDENCE ACT, No. 20, 11 O.C. 95.

(12)—illegal or legally insufficient to establish alleged custom—Existence or non-existence of custom a question of law—Right of High Court to interfere in second appeal to consider validity of finding. See CUSTOM, No. 1, A.W.N. (1908), 112.

(13) Reference to arbitration—Question as to admissibility of evidence should be decided in their very inception. See ACT IX OF 1899 (ARBITRATION), No. 2, 10 Bom. L.R. 351.

(14) Remand involving taking of fresh evidence—Object of remand is that first Court may take evidence there—Power of District Court to take any evidence it may think necessary implied by order of remand. See TRANSFER OF PROPERTY ACT, No. 80, 10 Bom. L.R. 536.

(15) Compromise petition filed in criminal proceeding constituting a lease—Proceeding withdrawn—No order incorporating terms of petition—Petition not admissible in evidence without registration. See REGISTRATION, No. 1, 12 C.W.N. 874.

(16) *Thakbust* maps—Statement recorded in presence of parties—Evidentiary value. See THAKBUST MAPS, No. 1, 35 C. 621.

(17) Secondary evidence of the terms of a mortgage-deed—Admissibility. See MORTGAGE (REDEMPTION) No. 20, 11 O.C. 285.

(18) Evidentiary value of unregistered deed of partition. See REGISTRATION ACT, No. 5, 4 M.L.T. 354.

(19) Expert opinion on questions of insanity, value of—Burden of proof in cases of insanity—General rules of estimating evidence as to insanity. See LUNACY, No. 1, 10 Bom. L.R. 1004.

(20) Plaintiff alleging that his *mugarrar idari* rights were created by deeds executed by or on behalf of proprietary body owning *shamilat*—Deeds not registered—Deeds inadmissible in evidence. See CUSTOMS (PUNJAB—SHAMILAT LAND), No. 1, 189 P.L.R. 1908.

(21) Entries in *batwara papers* as to rent payable by tenant, whether evidence against tenants. See ACT V OF 1897 (PARTITION), No. 2, 13 C.W.N. 93.

Evidence—(Concluded).

(22) Unregistered lease, where registration is necessary—Admissibility in evidence. See LEASE, No. 4, 10 Bom. L.R. 1146.

(23) Unregistered dastak allowing plaintiff to take possession of land to cultivate it—Not a lease—Admissible in evidence. See REG. XI OF 1825 (BENGAL ALLUVION AND DILUVION), No. 1, 8 C.L.J. 538.

(24)—of long and uninterrupted enjoyment may supply absence of words importing hereditary character of tenure—Evidence of descent from father to son. See EJECTMENT, No. 5, 8 C.L.J. 513.

(25) Agreement for payment of dower naming amount to be paid—Husband cannot adduce evidence to prove that transaction was unreal—Husband bound by agreement irrespective of his means. See MAHOMEDIAN LAW (PARTITION), No. 1, 13 C.W.N. 153.

(26) Letting, in second appeal. See APPEAL (SECOND APPEAL), No. 3-a, 31 M. 415.

(27) Decision of Revenue Court as to whether certain land is rent-free or rent-paying, evidentiary value of. See SANAD, No. 1, 7 C.L.J. 202.

(28)—necessary to prove grant of independent right of fishery in a navigable river. See FISHERY, No. 1, 12 C.W.N. 334.

(29) Nature of, required in cases of ejectment—Evidentiary value of Revenue Survey Maps. See POSSESSION, No. 2, 12 C.W.N. 273.

Evidence Act (I of 1872).

(1) Proof of custom—Value of confessions of judgment and admissions. See CUSTOMS (PUNJAB), PRE-EMPTION, No. 4, 26 P.R. 1907 = 69 P.L.R. 1908.

(2) *Ss. 8, 18, 21, 66, 91 and 157—Mortgage deed—Admissibility of oral evidence to prove its contents—Secondary evidence of documents and oral evidence—Difference.*

According to S. 91 of the Evidence Act, "the terms of a mortgage can only be proved by the production of the mortgage deed or of secondary evidence of its contents, in case it is shown to be lost or destroyed, or the opposite party who has the document fails to produce it after notice. In a case where the document was not shown to have been lost or destroyed, and the other party got no notice to produce it, oral evidence of its terms was held to be inadmissible.

Evidence Act (I of 1872)—(Continued).

Distinction pointed out between secondary evidence of the contents of a document and oral evidence of the transaction under S. 157, or as showing the conduct of the parties under S. 8 or as an admission under S. 18 (2) and 21 of the Evidence Act. **Mi Le Byu v. Mi Shwe Mya and Nga Bao**, U.B.R. (1907), Fourth Quarter, Evidence, 13.

SHAW, J. C.

References.—U.B.R. (1892-96) II, 586, U.B. R. (1897-01), II, 382, 556, R

(3) Ss 11 and 43—Orders recorded in a suit, not *inter partes*, relevancy of. See CIV. PRO. CODE, No. 103, 4 N.L.R. 129

(4) S. 13.—Transactions *inter alios*—Proof of title—Successful resistance, on several previous occasions to proposals, by Revenue authorities to settle certain portions of land, on which *jhum* cultivation was being made, as *alam* land, open for settlement—Inference of land being included within permanently-settled estate—Inapplicability of Reg. III of 1891. See REG. III OF 1891, No. 1, 12 C.W.N. 1095

(5) S. 13—Judgment in previous suit—Admissibility in evidence. See DEBUTTER ESTATE, No. 1, 12 C.W.N. 739.

(6) Ss 13, 65 and 66 (2)—*Grants, construction of—Secondary evidence—Judgments not inter partes, admissibility of—Board's letter—Recognition—Notice to quit.*

Where a grant of land was made as a present for the purpose of planting a garden, and another was made "subject to faithful service," and the documents of grants did not contain any words expressly limiting the grants to the life of the grantee, nor making them descendible to the heirs of the grantee, *held*, they conveyed only life grants.

In a suit for *has* possession on the ground that the defendants were trespassers on the death of their ancestor, the grantee, the plaintiff, relied on office copies of grants kept in the course of business of the grantor's *sherista*, *held*, that no notice to the defendants to produce the original was necessary to render secondary evidence admissible, as the defendants, from the nature of the case, must have known, that they would be required to produce the originals.

Evidence Act (I of 1872)—(Continued).

Where judgments not *inter partes* were filed to show that similar grants were resumed by the grantor or his heirs on the death of the grantee,

held, they are admissible in evidence under the provisions of S. 13 of the Evidence Act.

Board's letter, dated the 26th November, 1792, showing that jagirs are resumable on the death of the grantee is inadmissible in evidence.

When the agent of the grantor, in ignorance of the death of the grantee, granted rent receipts to the heirs in the name of the grantee, *held*, the receipts did not recognise the heirs as tenants and successors of the grantee, and it was not necessary to give them notice to quit before bringing a suit against them. **Syed Mohammad Khan v. Maharaja Nam Narain Singh Bahadur**, 7 C.L.J. 90

RAMPINI AND WILKINS, JJ

(6-a) S. 18—See No. 2, *supra*

(6-b) S. 21—See No. 2, *supra*

(7) S. 21, cls. (1) and (3), S. 32 (5) and S. 157—*Admission by plaintiff—When admissible in his favour—Statement in previous deposition.*

When the plaintiffs sought to establish their pedigree by proving *inter alia* that A and B were brothers, *held*, that a statement to that effect, made by one of the plaintiffs, in a deposition given long before the controversy in suit arose, was admissible in evidence. **Jadu Nath Sarkar v. Mahendra Nath Rai Chowdhury**, 12 C.W.N. 266.

MACLEAN, C.J., AND HOLMWOOD, J.

(8) S. 32—*Partnership—Account books of the partnership—Entries in them binding on partners inter se—A partner can surcharge and falsify the accounts—Sleeping or dormant partner—Relation between him and the managing partner—Accounts—Directions to Commissioner.*

Where account books are admitted in evidence before the Commissioner under S. 32 of the Evidence Act, as having been kept in the ordinary course of business by persons deceased, it is in the discretion of the Court to hold that they are sufficient evidence of the transaction to which the entries of the book relate without further proof (a).

Evidence Act (I of 1872)—(Continued).

The partnership books being accessible to all the partners and being kept more or less under the surveillance of them are *prima facie* evidence against each of them, and also for any of them against the others. But they are not conclusive evidence if the person complaining of them can by clear evidence show that there is an error in the books. When there is a question of surcharging and falsifying accounts, the case alleged must be clearly proved by the person impeaching them, and if there is any doubt it will be determined against him.

The law of partnership is, no doubt, a branch of the law of agency, but the position of the partners *inter se* cannot be altered because one partner chooses to take no part in the business, nor can he acquire greater rights on that account against his partners. Managing partners are principals as well as agents and cannot be compelled to prove payments made by them in the same way as an agent.

In law, a sleeping or dormant partner is a partner who is not known as such to third parties dealing with the firm. A partner who takes no part in the business may be called in popular phraseology a sleeping partner, but this term should never be used in defining the relationship of partners *inter se*. It has nothing to do with the amount of work done by an individual, as a managing partner may conduct the whole business of a firm and will yet be a sleeping partner, if he is known only as a manager to persons dealing with the firm. The partner who takes no active part in the business of the firm does not occupy a more favourable position as regards his partners on that account, nor is he entitled to any protection as against them. **Daji Abaji Khare v. Govind Narayan Bapat**, 10 Bom. L.R. 811.

MACLEOD, J.

Reference —(a) 6 Bom. L.R. 50, F

(9) Ss. 32 (2), 35—Admissibility in evidence—*Chowkidari register, entry of chakran land in, if made in discharge of official duty—Made "in the ordinary course of business"*

Reg. XX of 1817 does not impose on the Daroga any duty of keeping a register of *chowkidari chakran* lands.

From the precise and uniform character of the entries as to such lands appearing in a register kept under the Regulations, *held*, that there could be no doubt that they were made under proper direction in the ordinary course of business though outside the statutory duty of the person who made them.

Evidence Act (I of 1872)—(Continued).

That S. 35 of the Evidence Act did not cover such entries, but S. 32 (2) of the Act applied, and they are admissible in evidence (a).

The phrase "in the course of business" does not apply to any particular transaction of an exceptional kind, such as the execution of a deed of mortgage, but to business or professional employment in which the declarant was ordinarily or habitually engaged.

The "business" referred to may be of a temporary character (b) **Sheonandan Singh v. Jeonandan Dusat**, 13 C.W.N. 71

HOLMWOOD AND SHARFUDIN, JJ.

References —(a) 25 A. 90, R. (b) 23 B. 63, R

(10) S. 32 (3)—Preliminary inquiry under Merchant Shipping Act—Depositions of officers of vessel of defendant Company—Admissibility of such depositions, where statements not challenged by defendant's solicitor. See ACT V OF 1883 (MERCHANT SHIPPING), No. 1, 35 C. 751

(11) S. 32 (5)—Pedigrees not constituting ancient family record handed down from generation to generation and added to as occasion arose, but drawn up for particular purpose—Evidentiary value—Admissibility. See HINDU LAW (SUCCESSION), No. 9, 13 C.W.N. 1 (P.C.)

(11-a) S. 32 (5)—See No. 7, *supra*.

(12) S. 35—Examination of *thugay* or revenue surveyor—Proof by him of entries made in ordinary course of duty—Entries admissible in evidence under S. 35, Evidence Act. See GIFT, No. 1, 14 Bur. L.R. 30.

(12-a) S. 35—See No. 9, *supra*.

(12-b) S. 43—See No. 3, *supra*.

(13) S. 51—Opinion of expert witness as to value of land—How far expert evidence to be guide in ascertaining market-value. See ACT I OF 1894 (LAND ACQUISITION), No. 14, 10 Bom. L.R. 907.

(14) S. 65—See No. 6, *supra*.

(14-a) S. 66—See No. 2, *supra*.

(14-b) S. 66 (2)—See No. 6, *supra*.

(14-c) S. 76—Receipt of money due to plaintiff by defendant—Liability of the latter. See BOMBAY ACT XX OF 1881, No. 1, 2 Sind. L.R. 20.

(15) S. 90—Presumption, how weakened—Lessor and lessee—Adverse possession—Non-payment of rent, if creates adverse possession—Lessee holding over—Limitation Act (XV of 1877), Sch. II, Art. 139.

Evidence Act (I of 1872)—(Continued).

The Court may presume the genuineness of a document more than 30 years old, if it be produced from proper custody, but the effect of the presumption may be weakened by circumstances which tend to raise doubts as to its authenticity.

Where a lessee enters into possession under a lease, he cannot acquire any title by adverse possession against his lessor pending the term of the lease unless he distinctly asserts such a title to his knowledge and gives him notice that he asserted such a title. A failure to pay rent to the lessor during the period of the lease does not alone operate to create in favour of the lessee a title by adverse possession (a).

If a lessee holds over after the expiry of the lease and if no subsequent arrangement is arrived at between him and his lessor by which a new tenancy is created, time begins to run under Art. 139, Sch. II of the Limitation Act, against the lessor from the date of the expiry of the lease (b). **Madan Mohan Gossain v. Kumar Rameswar Mallia**, 7 C.L.J. 615.

BRETT AND SHARFUDDIN, JJ.

References —(a) 4 C 314 and 7 B 40, R. (b) 22 B 893 and 24 B. 504 = 2 Bom. I. R. 491, F, and 8 M 424, Diss

(16) *S. 91—Money lent on promissory note—Right to resort to original consideration—Oral evidence of the loan, admissibility of.*

A document was drawn to the following effect.—

“On the 8th *Waso lasan*, 1265, Ko Waik and his wife Mi. Ni.....said to.....U Chit and son Ko Po Tan,.....We are in need of money, please lend us Rs 400, on interest at 4 annas *per* Rs. 10 *per* month; accordingly... U Chit and son.....lent the money on interest at 4 annas *per* Rs. 10 *per* month. The principal and interest must be paid in full on the forthcoming month of *Tagu*, Ko Waik and wife.....agreeing that in case of failure to pay the money, the land described below should be taken up and enjoyed.—This is the first time the land has been mortgaged. It must not be mortgaged to any one else.”

In this document, the latter part was ineffective for want of registration, and the former part which contained a distinct promise to pay came within the definition of a promissory note given in S. 4 of the Negotiable Instruments Act (1881).

Evidence Act (I of 1872)—(Continued).

Held, that the promissory note, being the record of the loan transaction, S. 91, Evidence Act, debarred the plaintiff from resorting to the original consideration, and made oral evidence of the loan inadmissible. **Nga Waik v. Nga Chet**, U.B.R. (1907), Third Quarter, Evidence, 5.

SHAW, J.C.

References.—1 East 55; U.B.R. (1897-1901), II, 390, 391, *superseded*, 3 A. 717; 4 A. 135; 9 A. 351, 26 A. 178, F, 12 B 443; 24 B. 360, Diss.; 3 C. 314; 7 C. 256; 8 C 721; 23 C. 851, Diss; 5 M 166; 7 M 112; 10 M. 94; 23 M. 527; 21 W.R. 1; 24 W.R. 88, R.

(17) *S. 91—Promissory note, loss, of—Proof of contents.*

Where a plaintiff bases his cause of action on a promissory note, which he alleges had been lost, he cannot prove the contents, unless he succeeds in proving the loss of the document, apart from the note in which the contract was recorded. **Siraj Hussain v. Bulaki Ram**, 5 A.L.J. 162 = A.W.N. (1908), 91

AIKMAN AND KARAMAT HUSSAIN, JJ

Reference —28 A. 298, D.

(18) *S. 91—Agreement inadmissible—Oral evidence barred.* See REGISTRATION ACT, No. 3, 89 P R. 1908.

(18-a) *S. 91—See No. 2, supra.*

(19) *Ss. 91 and 92—Question as to who were the parties to a contract, whether one of the terms of the contract—Oral evidence, admissibility of, thereon.*

A question as to who the contracting parties are is not a question as to the ‘terms of the contract,’ within the meaning of Ss. 91 and 92 of the Evidence Act, and it is open to a plaintiff to give (oral) evidence of circumstances which went to show that a defendant signed a bond on his own behalf and as the agent of his partner, another defendant (a). **Yenkata-subbiah Chetty v. Govindarajulu Naidu**, 18 M.L.J. 1 = 3 M.L.T. 259 = 31 M. 45.

WHITE, C.J., AND WALLIS, J.

References.—(a) 7 Taunt. 295, and L.R. 6 C.P.C., Ex. Ch 486, F.; also, 2 H.L.C. 579, R.

(20) *S. 92—Oral evidence to prove that a deed purporting to be a mortgage was intended to be a sale, admissibility of—Representatives in interest of parties to the suit.*

Evidence Act (I of 1872)—(Continued).

Held, that oral evidence is not admissible between the parties to a deed which purports to be a mortgage, or their representatives in interest, to prove that it was intended to be a sale. **Zaki-ud-din Khan v. Akram-ud-din Khan**, 11 O.C. 95.

CHAMBER, J.C.

Reference :—22 A. 149, R.

(21) S. 92—Registration Act (III of 1877), S. 17, cl. (b)—Variation of terms of registered deed—Compromise in mutation proceedings varying the terms of registered deed—Admissibility.

A mortgage was executed by one mortgagor on condition that the property could not be redeemed within 25 years. In the Revenue Court a co-owner of the mortgagor objected to mutation of names. The matter was compromised, the condition being that the objector withdrew his objections, and the mortgagees' names were entered in the revenue registers, and it was provided that the mortgage could be redeemed in Jeth of any year. In a suit for redemption brought within 25 years, *held*, that the compromise could not be admitted in evidence inasmuch as it purported to modify the terms of the registered mortgage, and that the terms of a registered deed of mortgage could not be varied except by a registered instrument. **Sadaruddin Ahmad v. Chhajju**, 5 A.L.J. 717.

STANLEY, C.J., BANERJI AND RICHARDS, JJ.

(22) S. 92—Evidence to prove that person signing a pro-note signed not only as principal but also as an agent to a principal not named—Admissibility. *see RES JUDICATA*, No 7, 116 P.W.R. 1908.

(22-a) S. 92—*See* No. 19, *supra*.

(23) S. 92, Proviso (2)—Mortgage—Oral agreement adding to the terms of a registered mortgage deed—Admissibility in evidence—Degree of formality of document.

Defendant mortgaged certain shops and their stock in trade to the plaintiff. The plaintiff alleged in the plaint that it was agreed that the mortgage should include the goods which might be brought into the shop subsequent to the date of the mortgage as well. It was found that the mortgage deed, though registered, was drawn up not by a lawyer, but by a petition writer.

Held that in considering the degree of formality of the document the fact that it was not drawn up by a skilled lawyer was of much

Evidence Act (I of 1872)—(Continued).

more importance than the fact that it was registered, and that evidence of the alleged oral agreement was admissible under S. 92, Proviso (2) of the Evidence Act. **S. N. Nachlappa Chetty v. A. K. A. M. Choklingam Chetty**, 4 L.B.R. 240—14 Bur.L.R. 231.

IRWIN, J.

(24) S. 92, Proviso (4)—Registered partition deed—Subsequent disposal of property mentioned therein—Oral evidence to prove it admissible—Land suit—Long delay in suing no abandonment in law—The Punjab Courts Act XVIII of 1884, Ss. 3 and 70—The Punjab Tenancy Act XVI of 1887, S. 4—Indian Contract Act, IX of 1872, Ss. 44, 62 and 63—Admissibility of evidence in question of law within S. 70 (b).

K had three sons B, L, and N. On the 16th December, 1892, K. executed a registered partition deed allotting certain lands in G. to B and keeping the rest with him for L. and N. This deed was also signed by B. It further provided that this remaining property will remain in K's possession with full power of disposal until his death.

Among the lands reserved by K. were a well called Sitalwala and a piece of land on Saidullahwala well at T. On the 24th March, 1893, K. applied to the Revenue authorities for mutation of these lands in the name of B. and on 3rd April, 1893, the Tahsildar ordered, and on 2nd May, 1893, mutation was accordingly effected. On the same 3rd April, the Tahsildar acting on another undated application of K. directed mutation in B's favour of the lands at G mentioned in the said deed as given to him and was finally effected on 20th May, 1893. But no change was made in the Revenue records as to the other land which remained recorded as the property of K.

Things remained in this state until 1900, when both K. and B. died. The latter left, C. B. a boy of 15 or so, who in May 1904, sued L. and N. for recovering possession of 10 Bighas of land at G. on the allegation that during his minority they wrongfully seized the land and incorporated it with their garden.

L. N. pleaded that Sitalwala and Saidullahwala wells were given to B. in exchange for 10 Bighas. To this C.B. replied that it was an additional gift to his father B. by K.

Neither the application of 24th March, 1893, was forthcoming, nor was there any mention in the mutation proceedings based thereon that the said two wells were given in exchange.

Evidence Act (I of 1872)—(Continued).

L. and N. wished to prove this point by oral evidence while C. B. contended that S. 92, Proviso (4), barred them from doing so.

Held, by majority (Chatterji and Rattigan, JJ.) that the agreement or grant by way of exchange in respect of the land in suit was, in point of fact, a subsequent isolated fresh transaction relating to that property alone, after the title to it and to the rest of the land granted by the deed of 1892 had completely vested in B, and therefore amounted to a re-grant of it by B to L and N and their father K, and could be proved by oral evidence.

Per Johnstone, J.—The evidence of the alleged exchange involves rescission or modification of the terms of the registered deed of 1892 and is therefore inadmissible (a).

Held, also, that, a suit for land falling within the definition of land given in S. 4 of the Punjab Tenancy Act XVI of 1887 is a 'land suit' within S. 3 of the Punjab Courts Act XVIII of 1884. The fact that the land did not fall within this definition when the cause of action arose or some change occurred therein after institution does not make the slightest difference in the nature of the suit (b).

Held, further, that in the absence of express abandonment there is no abandonment in Law within the period of Limitation. Of course long unexplained delay in suing is relevant in certain cases (c).

Per Johnstone, J.:—Question of admissibility of evidence is a point of law within S. 70 (b) of the Punjab Courts Act, 1884. **Choudhri Bhagwan Singh v. Choudhri Narain Singh**, 129 P.W.R. 1903.

CHATTERJI, JOHNSTONE AND RATTIGAN, JJ.

References—(a) 169 P.R. 1883, 30 P.R. 1884, 14 P.R. 1889, 9 A. 249; 11 B. 47; 14 B. 472, *F.* by Chatterji and *D.* by Johnstone, 22 M. 264; 26 M. 195; 27 M. 368, *F.* by Johnstone and *D.* by Chatterji; 5 C.W.N. 296, *F.* by Johnstone; 62 P.R. 1879, *R.* by Chatterji; P.L.R. (1900), 459, *R.* by Johnstone. (b) 20 P.R. 1894; C.A. 1190 of 1906 (unpublished), *F.*; 31 P.R. 1906, *D.* (c) 85 P.R. 1892; 51 P.R. 1898; 43 P.R. 1901, *F.*

(25) *Ss. 92, 99*—S. 92, nature of barrier against extrinsic evidence provided by—When extrinsic evidence may be given—Effect of fraud and collusion—Suit for pre-emption—Transaction, whether sale or mortgage.

Evidence Act (I of 1872)—(Continued).

The barrier against extrinsic evidence provided by S. 92 of the Act is, by the express terms of the section itself, one to be used only as between the parties to the instrument, or by their representatives in interest. S. 99 expressly gives a free hand to persons who are not in the above category, and, by necessary implication when read with S. 92, gives similar freedom to the executants of documents against such strangers. The object of S. 92 is to bind an executant by his writing for the benefit of other party to the contract. Once the parties agree as to the nature and extent of their contract, S. 92 immediately goes out of the case. It exists only to control dispute between such parties or their representatives in interest. Either side may give extrinsic evidence to vary the terms of the document, if the issue regarding the real nature of the written transaction is one between the parties thereto and a third person not bound by the writing.

The moment an issue can be raised as to whether or not an apparent sale is a mortgage, or the like, it necessarily opens the field of extrinsic evidence to both parties. It is always open in a pre-emption suit for an apparent vendor and vendee, if they are agreed that there has been no real sale, to prove as against the pre-emptor, that, what seems on the face of the writing to be a sale, was controlled by some agreement which bars, or places limitations on, the right of pre-emption. Such agreement may be fraudulent and collusive, but does not prevent its being put forward as a plea, and evidence being given to prove it. If the Court finds fraud and collusion, it will of course relieve the pre-emptor against it. That is a matter for adjudication in each particular case. The fact that a plea may be made fraudulently or collusively is not itself any reason for refusing to admit it, or evidence in support of it. **Gangabai v. Pandoo**, 4 N.L.R. 115.

STANFORD, A.J.C.

(26) *S. 93—Contract ambiguous on its face—Admissibility of evidence to show intention of parties—Civ. Pro. Code, S. 622.*

A District Judge held, that, a contract, compensation for breach of which was sued for, was ambiguous on the face of it. But, he held, that evidence was admissible to show the intention of the parties, and he acted upon such evidence. **Held**, this was in contravention of S. 93 of the Evidence Act, and illegal within

Evidence Act (I of 1872)—(Continued).

the meaning of S. 622 of the Civ. Pro. Code.
Jaman v. Ah Yu, 14 Bur. L.R. 58.

Fox, C.J.

(26-a) S. 99—See No 25, *supra*.

(27) S. 105—Retirement of dormant partner from partnership—Onus of proof. See PARTNERSHIP, No. 6, 75 P.R. 1908.

(28) S. 106—*Suit for damages by legal representative of deceased person killed by accident while travelling in Railway—Negligence—Burden of proof*

Where a suit was brought by the legal representative of a deceased person, who was killed at an accident, while travelling in the train of the defendant Company, the onus of proving that there was no negligence on the part of the Railway Company, lies on such Company.

This decision is supported not only by the ruling in the case of the *Great Western Railway Company of Canada v. Braid* (1 Moore's Privy Council Cases, New Series, p 101), namely, that the fact of a breach on a line of Railway is *prima facie* evidence of improper construction or maintenance which it is for the Railway Company to rebut, but also by the general rule of the law of evidence that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him (S. 106 of the Indian Evidence Act). **The Madras Railway Company v. Ratilal Kalidas**, 4 M L.T. 251.

DAVIES AND BENSON, JJ

Reference —1 Moo P.C. Cases, New Series, p. 101.

(29) S. 108—*Presumption as to death—Person not heard of for seven years—Time as to when presumption arises—Onus*

S. 108 of the Evidence Act makes provision for the question whether a man is alive or dead, that is, whether he is alive or dead when the question is raised, and not whether he was alive or dead at some antecedent date; the law raises no presumption as to the time of his death, and the presumption that may, in certain circumstances, be raised, is a presumption that the man is dead when the question is raised, and not a presumption that he was dead at some antecedent date.

It is on the person, who alleges that the person was dead at antecedent time, to prove that fact by evidence. **Rani Bhusan Banerjee v. Surja Kanta Roy Chowdhury**, 5 C.L.J. 649 = 11 C.W.N. 883 = 85 C 25;

MACLEAN, C.J., AND GEHDT, J.

Evidence Act (I of 1872)—(Continued).

(30) S. 111—Burden of showing good faith where one party stands in fiduciary relationship to another—Whether all accounts on which contract is based should be proved to be correct. See CIV. PRO. CODE, No. 1, 12 C.W.N. 1102

(31) S. 115—Law of estoppel in force in this country. See OCCUPANCY HOLDING, No. 1, 12 C.W.N. 72.

(32) S. 115—Representation by widow that she was competent to adopt—Widow adopting a person publicly—Suit by widow for declaration of her incompetency to adopt—Adopted son incurring heavy liabilities to maintain adoption against reversioner—Widow estopped from maintaining suit. See ESTOPPEL, No 1, 5 A.L.J. 568.

(33) S. 115—Estoppel—Effect of recital in a deed, in an action not founded on it but wholly collateral to it—Promise whether can be the foundation of estoppel. See TRANSFER OF PROPERTY ACT, No. 3, 11 O.C. 301.

(34) S. 115—Estoppel against a minor—False and fraudulent misrepresentation by a minor—Principle of liability. See CONTRACT ACT, No 2, 5 A.L.J. 674.

(34-a) S. 115—Estoppel by conduct. See ESTOPPEL, No 2-a, 150 P.R. 1906

(34-b) S. 116—*Estoppel by a tenant—Lease executed by a tenant in the name of the benamidar—Landlord, the real owner under this section.*

Where a lease is executed by a tenant in favour of the *benamidar*, the real owner, rather than the *benamidar*, must be regarded as the landlord for the purposes of this section

A person, having admitted that he is a *benamidar* and not having shown any right to sue under the general law, has no right to sue the tenant for rent, and in such a suit the tenant can deny his right to sue. **Kuppu Konan v. Thirugnana Sammandam Pillai**, 81 M. 461.

WALLIS, J.

Reference —30 M 245, F

(35) Ss. 123, 124 and 162—*Income Tax Act (II of 1886), Ss. 14, 26 and 38—Statements before Income Tax Collector—State-documents—Official communication—Privilege—Officer's liability to bring documents—Court's power to record evidence—Validity of reasons for non-production—Disclosure to Court no breach of official confidence—Documents produced on process of law.*

Evidence Act (I of 1872)—(Concluded).

Statements made before the Income Tax Collector do not relate to affairs of State and so are not governed by S. 123 of the Evidence Act.

The Income Tax Collector, summoned to produce, is bound to produce the books in his possession, in spite of the Rules made under S. 38 of the Income Tax Act, forbidding disclosure (a)

Under S. 162 of the Evidence Act, a witness should not decline to bring documents to Court on the ground of privilege. Under the same section, the Court has power to inspect the documents for the purposes of deciding objections regarding production or admissibility.

The provision relating to the non-disclosure of information, given or obtained "in official confidence," does not apply to the production of documents in a Court of Justice.

Rule 15, framed under S. 38 of the Income Tax Act, is meant only for the guidance of the Income Tax Officers, and not for the preclusion of any evidence being given in a Court of Justice.

Orders under S. 14 or S. 26 of the Income Tax Act, determining the amount of income tax, are not privileged documents.

Documents produced on statements made under process of law cannot be said to be made or given "in official confidence." **Yenkatachella Chettiar v. Sampathu Chettiar**, 4 M. L.T. 317.

ARNOLD WHITE, C.J., AND SANKARAN NAIR, J.

References—(a) 3 Campb. 327; 2 Madras Sessions, 1863, 26 B. 281 (284), *R* and *Appr*, L.R. (1900) Ch. 347, *D*.

(35-a) S. 124—See No. 35, *supra*.

(36) Ss. 137, 138 and 154—Examination of defendant as witness for plaintiff at the very outset of the case, propriety of. See *RES JUDICATA*, No. 7, 116 P.W.R. 1908.

(37) S. 138—See No. 36, *supra*.

(38) S. 154—See No. 36, *supra*.

(39) S. 157—See Nos. 2 and 7, *supra*.

(40) S. 132—See No. 35, *supra*.

Examination.

(1) Board of examiners, discretion of—*Madamdas*—Jurisdiction of the Court to interfere. See *ATTORNEYSHIP EXAMINATION*, No. 1, 12 C.W.N. 873.

(2) Issue of commission for, of witnesses not exempted by C.P.C., whether Civil Court has jurisdiction to order. See *COMMISSION*, No. 1, 3 M.L.T. 246.

Exchange.

(1)—of parts of property liable to partition—effected during suit for pre-emption—binding nature of—on pre-emptor. See *ACT III OF 1901* (N.W.P. and O. LAND REVENUE), No. 4, 10 O.C. 363.

(2) Suit upon covenant in registered deed of exchange of lands—Special contract to indemnify on deprivation. See *LIMITATION ACT*, No. 63, 18 M.L.J. 477.

Execution.

—of document—Signing, whether necessary. See *STAMP ACT* (ACT I OF 1879), No. 1, U.B.R. (1907), 4th Quarter, *Execution—Signing*, 5.

Execution of decree

(1) *Decree directing sale of nij jote lands mortgaged—Mortgagor-judgment-debtor, if competent to raise the question of the saleability of the jotes, in execution—Saleability or otherwise of nij jote lands, onus of proof of—(Regulation III of 1872), S. 11—Sonthal Pergunnahs Regulations—Settlement Court, decisions of—Suit, maintainability of*

Where a mortgage decree distinctly provides for the sale of certain *nij jote* lands mortgaged, and directs that the mortgage-debt must be realized, in the first instance, by the sale of the mortgaged property, it is not open to the mortgagor-judgment debtor to object to the execution of the decree on the ground that the *jotes* are not saleable.

The onus is not on the decree-holder, in such a case, even if it were open to the judgment-debtor to raise the question of the saleability of the *jotes* to show that the *jotes* are saleable, but on the judgment-debtor to prove that the *jotes* are not saleable.

In the absence of a decision of any settlement Court or of a decision by any Civil Court on the question of the transferability of these *jotes*, a suit for the sale of such *jotes* mortgaged does lie in the Civil Court. **Kartik Sahu v. Nilambar Singh**, 7 C.L.J. 101.

RAMPINI AND MOOKERJEE, JJ.

(2) *Plaintiff obtaining decree for part of his claim—Appeal as regards part dismissed—Execution of decree—Right to prosecute appeal.*

A plaintiff, who has obtained a decree for part of his claim and has appealed as regards the part dismissed, is not debarred from prosecuting the appeal because he has begun to execute the

Execution of decree—(Continued).

said decree. **Raghu Mal v. Bandu**, 31 P.R. 1907 (F.B.)=64 P.W.R. 1907=1 P.L.R. 1908.

REID, JOHNSTONE AND RATTIGAN, JJ.

Reference —82 P.R. 1868, overruled

(3) *Time fixed for filing petition—Failure—Striking off petition—No disposal of petition—Pending*

Where, in the case of a decree-holder who had applied for execution as against a judgment-debtor residing outside the jurisdiction of the Court, the Court, which, under the circumstances, had the power, under S. 223 of the Civ. Pro. Code, on the application of the decree-holder to transmit the decree to another Court for execution, without any such application, gave the plaintiff a week to apply for an order of transmission, and, as he did not so apply, struck off the petition on the seventh day, *held* that this was not a disposing of the petition and it should still be treated as pending (a) **Pan-Chagaula Subrahmanyam Aiyer v. Polipalli Rangiah**, 17 M.L.J. 616=3 M.L.T. 261

WALLIS, J.

Reference —(a) 27 A. 334, R

(4)—*Limitation—Application in continuation of previous proceedings in execution.*

On the 7th December 1903, the sale of certain immovable property, which had been attached, was ordered. On the 30th January, 1904, the Amin reported that he had been unable to hold the sale, as there were no bidders. Notice of this fact was given to the decree-holder and he was allowed time till the 10th February to pay in fees for a fresh sale. On that date no steps having been taken by the decree-holder, the case was ordered to be struck off "for the present." On the 13th January, 1906, the decree-holder again applied, asking that the property, which was still under attachment, might be sold. *Held* that this was not a fresh application in execution, but merely "an application to revive the former proceedings, and was not barred by limitation. **Mujib-ullah v. Umed Bibi**, A.W.N. (1908), 227

AIKMAN, J.

References —5 C.W.N. 347; 18 A. 482 and 9 M.L.A. 324, R.

(5) *Execution proceedings—Suit—Sale by mortgagee of property not mortgaged, validly of, where to be questioned—Civ. Pro. Code (XIV of 1852), S. 413—Guardian*

Execution of decree—(Continued).

and Wards Act (XL of 1858), S. 3—Appointment of guardian ad litem other than the certificated guardian.

Where a puisne mortgagee, who was not made a party to the suit of the prior mortgagee, instead of proceeding against the property sold in execution of the decree of the prior mortgagee, proceeded against other properties of the mortgagor and sold them. *Held*, that it was a matter to be complained of and (if wrong) remedied in execution proceedings and not by a separate suit.

If a person, who was not a certificated guardian of the minor, was appointed a guardian *ad litem* at a time when Act XI. of 1858 was in force: *Held*, that the passing over of the certificated guardian was not more than an irregularity and would not of itself vitiate either the decree passed or a sale consequent upon such decree (a). **Jogeshwar Narain v. Lala Mooralidhar**, 7 C.L.J. 270

WOODROFFE AND COXE, JJ.

Reference —(a) 29 A. 290, R

(6) *Sale of ancestral property—Civ. Pro. Code, S. 320—Rules framed by Local Government—Application under Rule 17 (XIII-A)*

One of several co-owners of ancestral property which had been sold by the Collector under the Rules framed by the Local Government under section 320 of the Code of Civil Procedure applied under Rule 17 (XII) to have the sale set aside upon the ground of material irregularities in the conduct of the sale causing substantial loss. Another of such co-owners, whilst the first application was pending, applied under Rule 17 (XIII-A) to have the sale set aside, making at the same time the necessary payments into Court required by the Rule.

Held that, upon the presentation of the latter application under Rule 17 (XIII-A), the Collector was bound to set aside the sale, and was in no way precluded from so doing by the existence of the former application under Rule 17 (XII). **Tulsi Ram v. Izzat Ali**, A.W.N. (1908), 77=5. A.L.J. 253=30 A. 192.

STANLEY, C.J., AND BURKITT, J.

References —23 C. 686, 29 C. 1, R.

(7) *Decree on appeal—Original decree modified—Civ. Pro. Code, S. 230—Limitation.*

Execution of decree—(Continued).

Where the appellate Court modifies the original decree, it is the decree of the appellate Court that can be executed; and limitation runs from the date of the appellate decree.

So the period of twelve years, prescribed by S. 230 of the Civ. Pro. Code, must be counted from the date of the decree passed on appeal.

Mahomed Mehdi Bella v. Mohini Kanta Saha Chowdhry, 34 C. 874 = 7 C.L.J. 305.

RAMPINI, AG. C.J., AND SHARFUDDIN, J.

Reference.—25 C. 594, F.

(8) *Application for—Amended decree, limitation in case of.*

Held, that an application for execution, made after three years from the date of the original decree, but within three months of the date of an amendment of the decree, by which it became for the first time capable of execution, was within limitation **Musammat Zubra Bibi v. Musammat Zulaikha Bibi**, 10 O.C. 22.

CHAMIER, J.C.

References—24 A. 300, 17 A. 39, 26 M. 780, F.

(9) *Stay of execution—Impossibility of restoring parties in statu quo—Appeal.*

The fact that it would be impossible to restore the parties in statu quo may or may not be a ground for granting a stay of execution of a decree; but it does not render the order refusing the stay a "judgment." No appeal lies from such order **Kodiva Sahib v. Syed Rahimatalla Sahib**, 3 M.L.T. 307.

WHITE, C.J. AND MILLER, J.

Reference.—24 M. 358, F.

(10) *Transfer to another Court—Power of Court, to which decree has been transferred, to grant permission to continue execution proceedings begun upon the application of a decree-holder since deceased—Civ. Pro. Code, S. 232.*

Held, that the Court to which a decree has been transferred cannot give permission under S. 232 of the Civ. Pro. Code, to continue execution proceedings begun upon the application of a decree-holder, since deceased. Such permission can be granted only by the Court which passed the decree. **Nazhat-ud-dawla Abbas Hassan Khan v. Prince Wala Kadar Hussain Ali Mirza**, 11 O.C. 412.

CHAMIER, J.C., AND GRIFFIN, A.J.C.

Reference.—27 C. 488, R.

Execution of decree—(Continued).

(11) *Execution of decree, application for, on the last day of twelve years succeeding the date of the decree—Civ. Pro. Code, S. 230.*

The applicant obtained a decree against the respondent on the 11th April, 1895. He made several applications for execution from time to time. The last application was dated the 11th April, 1907, being the last day of twelve years succeeding the date of the decree. *Held*, that the application could not be granted (a) **Deoki Nandan v. Saiyed Nazir Hasan**, 11 O.C. 57.

EVANS AND CHAMIER, J.C.s

References—(a) 6 M. 359, not F., 18 A. 482 (489) and 21 A. 155, R.

(12) *Sale in execution of decree of inferior Court by order of Court of higher grade—Second appeal where decree of lower Court executed by a higher Court—Civ. Pro. Code, Ss. 244 and 285.*

The respondent obtained a decree against the appellants in the Court of the Munsiff in execution of which certain property of the appellants was attached. The Munsiff submitted the usual sale statement to Government in order that the sale of the property which was ancestral, might be sanctioned under S. 20 of the Oudh Laws Act. The sale was sanctioned, but, before the sanction reached the Munsiff's Court, the property was attached by the order of the Subordinate Judge in execution of a decree obtained in his Court by a third party. The Subordinate Judge purporting to act under S. 285 of the Code of Civil Procedure sent for the file of the execution proceedings from the Munsiff's Court and caused the property to be put up for sale in execution of the Munsiff's decree.

Held that, having regard to the provisions of S. 285 of the Code of Civil Procedure, the order of the Subordinate Judge was illegal; he ought to have sold the property in execution of the decree passed by himself and ought not to have executed the decree passed by the Munsiff.

Held, further, that the proceedings before the Subordinate Judge were, under S. 244 of the Code and a second appeal was admissible. **Kalka Prasad v. Saiyed Akbar Ali**, 11 O.C. 41.

CHAMIER, J.C.

Execution of decree—(Continued).

- (13) *Decree-holder putting property to sale without disclosing his lien, effect of—Purchaser without notice, liability for the undisclosed lien—Civ. Pro. Code, Ss. 237 and 287*

Held, that a person who has caused the property of his judgment-debtor to be sold in execution cannot afterwards set up any claim of his own against that property unless he shows that the purchaser purchased with notice of it (a). **Baldeo v. Ausan Sing**, 11 O C 206.

EVANS, J. C.

References.—(a) 22 B 686; 10 C. 609; 15 M. 412; 5 C.W.N. 497; 20 B 290; 16 A 478, 1 B 314 and 12 B. 678, R.

- (14) *Decree as originally framed incapable of execution—Amendment of decree—Limitation Act (XV of 1877), Sch. II, Arts. 178 and 179.*

A decree for sale was obtained on a mortgage. The decree was made absolute on 3rd February, 1903. By mistake of the Court or its officers, the decree ordered the sale of a village which did not in fact exist. The decree holders applied for correction of the decree, and on 14th November, 1903, the correct name was substituted. Within three years from that date but upwards of three years from that of the order absolute, the decree-holders applied for execution of the decree. *Held*, that the application was within time. A decree ordering sale of a non-existent village is incapable of execution, as it would be impossible to comply with the provisions of the law as to making and affixing proclamation on the property (a). **Bihari v. Risal**, 5 A L J. 403.

AIKMAN AND KAHNAT HUSAIN, JJ.

Reference—17 A. 39, *relied upon*.

- (15) *Judgment-creditor coming to terms with his judgment-debtor—Effect—Auction purchaser applying to have order setting aside sale rescinded must show that the order had been improperly obtained.*

If a judgment-creditor comes to terms with his judgment-debtor, it is, as against the auction purchaser, equivalent to a receipt in full of the decretal amount by the judgment-creditor.

Where a sale is set aside by the order of the Court, it lies on the auction purchaser when applying to have that order rescinded, to show that the order had been improperly obtained,

Execution of decree—(Continued).

e.g., by showing that, at the time of the order, the judgment-creditor had not been satisfied. **Ma Sein Buwin v. Mahomed Hassim**, 14 Bur. L.R. 176

ORMOND, J.

References:—23 B 723, 1 C.W.N. 703, R.

- (16) *Refund of money realized in execution of a decree afterwards reversed in appeal—Limitation—Execution of decree stayed by injunction—Procedure.*

On the 7th October, 1901, an *ex parte* decree on a mortgage was passed in favour of the appellants. Before, however, the decree was made, the appellants had obtained an injunction restraining the respondents from realizing certain money deposited in Court to their credit. After this decree was passed, the appellants withdrew out of this amount Rs. 19,041. The decree was set aside on the 9th July, 1904. The suit was retried, and, on the 17th September, 1904, the Court of First Instance made a decree in favour of plaintiffs for Rs. 17,711-7-0. This decree was affirmed by the High Court on the 18th December, 1906. On the 17th September, 1907, the respondents applied for a refund of the difference (Rs. 1,804) between the sum realized by the plaintiffs and the sum finally decreed.

Held, that the plaintiffs were at liberty to proceed either by application or by suit (a), and that the application was not barred by limitation (b). **Bithal Das v. Jamna Prasad**, A W N (1908), 206=5 A.L.J. 527

BANERJI AND RICHARDS, JJ.

References—(a) 10 M I A 203, 28 A 665 and 29 A. 143, R. (b) 28 C. 113, D.

- (17) *Application for time—"Step in aid of execution"—Previous application barred—Notice on judgment-debtor—Estoppel.*

An application for time is not a step in aid of execution and does not prevent subsequent applications from being barred (a).

A judgment-debtor is not estopped from contending that a previous application for execution was barred by limitation merely because notice had been served on him and he did not appear to contest the proceedings (b). **Umed Ali v. Abdul Karim**, 8 C.L.J. 193.

STEPHEN AND HOLMWOOD, JJ.

References:—(a) 27 C. 285; 2 C.L.J. 240, F. (b) 8 C. 51 and 23 C. 374, *distgd*.

Execution of decree—(Continued).

- (18) *Order in execution proceedings, effect of, as res judicata—Limitation Act, S. 19, application of, to execution proceedings—Civ. Pro. Code, S. 230.*

Held, that orders in execution proceedings are binding on the parties in all subsequent proceedings in that suit on principles analogous to those of *res judicata*.

Held, further, that the effect of the previous order must be confined to the point actually decided.

Held also, that the provisions of S. 19 of the Limitation Act cannot affect the absolute prohibition, against the granting of an application after twelve years from certain dates, imposed by S. 230, Civ. Pro. Code (a). **Bhikhari v. Gauri Shankar**, 11 O.C. 220.

EVANS AND GREVEN, A. J. C.

References—(a) 11 B. 537, 14 B. 206, 18 C. 631 and 11 O.C. 57, R

- (19) *Appropriation of debt due to two persons towards a debt due against one of them alone—Amendment of plaint*

Held, that, in execution of a decree obtained against one person alone, a decree-holder is not entitled to have a debt due to that person and another jointly realised and applied towards the discharge of his decree (a).

Where a plaintiff sued on a promissory note in favour of himself and others who were added as defendants, on the plea that he alone was not entitled to the amount claimed, the plaintiff was allowed to amend his plaint so as to claim jointly for himself and the added defendants. **Bijai Bahadur Singh v. Jang Bahadur Singh**, 11 O.C. 225.

CHAMIER, J. C.

References—(a) 13 Q.B.D. 535 and L.R. (1891) Q.B.D. 509, R

- (20) *Limitation—Application in continuation of previous proceedings in execution.*

On the 7th December, 1903, the sale of certain immoveable property, which had been attached was ordered. On the 30th January, 1904, the Amin reported that he had been unable to hold the sale, as there were no bidders. Notice of this fact was given to the decree-holder and he was allowed time till the 10th February to pay in fees for a fresh sale. On that date, no steps having been taken by the decree-holder, the case was ordered to be struck off "for the

Execution of decree—(Continued).

present." On the 13th January, 1906, the decree-holder again applied, asking that the property, which was still under attachment, might be sold. *Held*, that this was not a fresh application in execution, but merely an application to revive the former proceedings, and was not barred by limitation. **Mujib-ullah v. Umed Bibi**, A.W.N. (1908), 227.

STANLEY, C. J., AND BANERJI, J.

References—5 C.W.N. 347, D. 18 A. 482, R.

- (21) *Application by decree-holder for payment of money deposited in Court—Step in aid of—*

An application by a decree-holder to the executing Court for payment to him of a certain sum of money deposited in Court in partial satisfaction of the decree is not ordinarily an application to take some step in aid of execution within the meaning of Art. 179 (4), Limitation Act, 1877.

The "fruits of the execution of decree" postulate surely that the decree has been executed, and the partial fruits of the execution of the decree equally postulate that *pro tanto* the decree has been executed. To take steps, therefore, to acquire those fruits cannot logically be regarded as a step towards executing the decree; for *ex hypothesi* the decree must have been executed (in whole or in part as the case may be) before those fruits, whether in whole or in part, can be acquired, whereas the expression "step in aid of execution" must clearly mean that the decree has not been executed when that step is taken. **Kasu v. Atar Singh**, 103 P.R. 1908 (F.B.) = 142 P.W.R. 1908 (F.B).

CLARK, C. J., AND CHATTERJI AND RATTIGAN, JJ.

References—107 P.R. 1881; 88 P.R. 1884; 27 P.R. 1888, 18 P.R. 1904; 76 P.R. 1904, 8 C. 89; 10 C. 549; 11 C. 227; 23 C. 196; 10 C.W.N. 28, F.; 11 M. 174, 16 M. 452, 17 M. 165; 22 B. 340; 6 A. 366; 12 A. 399, *not F*

- (22) *Claim to attached property—Questions for determination—Possession—Constructive possession—Civ. Pro. Code, Ss. 278, 280, 281.*

In an investigation under S. 278 as to moveable property, what the Court has to determine is merely the question of possession, and the Court cannot go into the question of title.

If the Court finds the claimant to be in possession, the only other question that can be considered is whether that possession is really on account of or in trust for the judgment-debtor (a).

Execution of decree—(Continued).

The words "possessed" and "possession" in Ss. 279 and 280 are not used in a restricted sense as relating to mere tangible or physical possession. They include constructive possession or possession in law (b). **Po Kya v. Lutchminappian Chetty**, 4 L.B.R. 289.

ROBINSON, J.

References —(a) 4 C. 402, R.; 27 M 67, 29 C. 543; 2 L.B.R. 152, F. (b) 27 M. 67, F.

(23) *Ambiguous or defective decree—Decree interpreted with reference to the pleadings in the suit.*

Where a Court has to execute a decree which is badly drawn up and ambiguous, it is permissible to refer to the pleadings in the suit in which the decree was passed, in order to ascertain its precise meaning **Nisar Husain v. Allah Bakhsh**, A.W.N. (1908). 257 = 5 A.L.J. 742

STANLEY, C.J., AND BANERJEE, J

References.—A.W.N. (1890), p 75; 13 A 343; 18 A. 344; N.W.P.H.C. Rep. 1870, p. 415, R.

(24) *Decree nisi—Decree absolute—Civ. Pro Code (Act XIV of 1882), S. 244—Transfer of Property Act (IV of 1882), S. 93.*

An application for redemption or foreclosure under a decree *nisi* is not an application in execution under the Civil Procedure Code, but must be made in Court under the Transfer of Property Act; and, until a decree *nisi* is made absolute, there is no decree capable of execution. **Sir Jehangir C. Jehangir v. The Hope Mills, Ltd.**, 10 Bom L.R. 1057.

MACLEOD, J.

References —21 C 818, 22 B 77, F

(25)—of personal decree against *Shabait* of idol, property sought to be sold in execution of —Suit for declaration that property is endowed, maintainability of. See CIV PRO. CODE, No. 156, 12 C W.N. 308.

(26)—of personal decree against *Shabait*—Attachment of immoveable property—Objection that property is *debutter*, validity of—S. 244, Civ. Pro. Code. See CIV PRO. CODE, No. 157, 12 C W.N. 310.

(27) Execution proceedings subsequent to trial of the suit are not judicial proceedings. See SANCTION TO PROSECUTE, No. 2, 35 C. 133.

Execution of decree—(Continued).

(28)—, property attached in, claimed as trust property—Order dismissing claim whether appealable—Order to form subject matter of separate suit—Proper procedure for investigating claim. See CIV PRO. CODE, No 158, 18 M.L.J. 21

(29) Application, though defective, containing prayer for issue of notice, under S. 244, C P C, enabling—to proceed will save limitation See LIMITATION ACT, No. 133, 18 M L J 14.

(30) —, step in aid of, -application for recognition by transferee decree-holder, whether a —See LIMITATION ACT, No. 134, 18 M L J. 24.

(31) Plaintiff challenging a decree in execution of which his property was attached—Value of suit See COURT FEES ACT (VII OF 1870), No. 16, 7 C L J. 36

(32) Decree for possession of equity of redemption—Decree-holder wrongfully obtaining possession of property instead of equity of redemption in execution of the decree—Suit by mortgagee claiming restitution of property See CIV. PRO CODE, No. 133, 5 P.R. 1907

(33) Payment of process fees, unaccompanied by any application asking Court to take some specification whether gives a fresh starting point for limitation See LIMITATION ACT, No. 131, A W N. (1908), 74

(34) —by a survivor of two joint decree-holders—Heir of a decree-holder, right of, to execute decree. See ACT VII OF 1889 (SUCCESSION CERTIFICATE), No. 3, 10 O.C. 378.

(35) Conditions under which a prior application for execution will be treated as pending and as not barred by limitation—Arts. 178 and 179, Limitation Act See LIMITATION ACT, No 121, 18 M L J. 46.

(36) Limitation for—, on withdrawal of appeal, whether to be counted from date of original decree or from date when appellate Court accepted withdrawal and closed the matter—Limitation for execution of original decree. See LIMITATION ACT, No 130, 87 P L R 1908.

(37) Whether an executing Court can sell what the judgment-debtor himself is unable to alienate privately. See MORTGAGE (GENERAL), No. 5, 7 P.W.R. 1908

(38) Application by decree-holder for—before realisation—Right of his representatives to rateable distribution. See CIV PRO. CODE, No 360, 3 M.L.T. 249.

Execution of decree—(Continued).

(39) Attachment of judgment-debtor's property—Alienation by judgment-debtor before order of attachment was served upon him—Whether valid. See CIV. PRO. CODE, No. 181, 1 Sind L.R. 176.

(40) —Auction-sale—Decree-holder bidding for property with the permission of Court—Right of set-off. See CIV. PRO. CODE, No. 199, 10 Bom. L.R. 296

(41) One of several decree-holders a minor—Extension of time—Minor's right to execute whole decree. See LIMITATION ACT, No. 12, 7 C.L.J. 308.

(42) Right of mortgagee-decree-holder to attach property—Application in execution—Suit. See TRANSFER OF PROPERTY ACT, No. 71, 10 Bom. L.R. 274

(43) Whether right to profits not yet accrued can be attached in. See CIV. PRO. CODE, No. 174, A.W.N. (1908), 101.

(44) Question relating to execution, discharge or satisfaction of the decree—Contest between holder of a decree for an undivided share of joint property and an auction-purchaser *pendente lite*. See CIV. PRO. CODE, No. 140, A.W.N. (1908), 93.

(45) Decree declaring wife's rights to future residence and maintenance—Whether relief can be granted in execution proceedings. See RESTITUTION OF CONJUGAL RIGHTS, No. 1, 1 Sind L.R. 184.

(46) Order to plaintiff to take steps under S. 331, Civ. Pro. Code—Whether proper disposal of execution petition. See CIV. PRO. CODE, No. 180, 3 M.L.T. 295

(47) Effect of reversal of decree on appeal—Maintainability of suit. See CIV. PRO. CODE, No. 161, 35 C. 265.

(48) Power of executing Court to refer to judgment and other documents to interpret decree—Divergence between decree and judgment—Decree-holder to be directed to apply for amending the decree—Practice. See DECREE, No. 4, 60 P.W.R. 1908.

(49) Decree under S. 88, Transfer of Property Act—Application for order absolute for sale—Whether application for execution of decree. See TRANSFER OF PROPERTY ACT, No. 54, A.W.N. (1908), 103.

(50) Limitation—Notice to judgment-debtor, under S. 248, Civ. Pro. Code, in execution of an application not in accordance with law,

Execution of decree—(Continued).

effect of, in saving limitation. See LIMITATION ACT, No. 126, 125 P.L.R. 1908.

(51)—, property put up to auction in—Purchaser not making deposit at once as required by S. 306, C.P.C.—Fresh sale for less sum to decree-holder—Validity and regularity of first sale—Right of second purchaser to claim compensation for loss resulting on second sale. See CIV. PRO. CODE, No. 201, A.W.N. (1908), 107.

(52) Sale of immoveable property—Property purchased by decree-holder—Decree-holder failing to obtain possession of property after sale confirmed—Property in the hands of judgment-debtor—Suit by decree-holder's assignee for possession of land barred by S. 244, C.P.C. See CIV. PRO. CODE, No. 142, 5 A.L.J. 285.

(53)—, whether the only point involved in administration suit—Limitation. See CIV. PRO. CODE, No. 131, 12 C.W.N. 614

(54)—, Appeal from decree—Appeal not pressed—Limitation. See LIMITATION ACT, No. 128, A.W.N. (1908), 161.

(55) Auction purchaser representative of judgment-debtor, not decree-holder—Judgment-debtor's application under S. 310-A being allowed—Appeal by auction purchaser, whether lies. See CIV. PRO. CODE, No. 207, A.W.N. (1908), 157.

(56) Order disallowing claim under S. 278, C.P.C., for want of prosecution—Conclusive unless suit is brought under S. 283. See CIV. PRO. CODE, No. 186, 11 O.C. 180.

(57)—allowing instalments—Executing Court to reconsider whole matter afresh with a view to substitution of some new scheme of instalments. See ACT XVII OF 1879 (DEKKHAN AGRICULTURIST'S RELIEF), No. 7, 10 Bom. L.R. 538.

(58) Attachment before judgment—Other attachments—Difference. See MAHUMAKKATHAYAM LAW, No. 2, 23 T.L.R. 57.

(59) Convenience of parties to be consulted in construing S. 649, C.P.C.—Expression 'Court which passed the decree' in S. 232, C.P.C., includes Court which gets jurisdiction owing to a transfer of jurisdiction. See CIV. PRO. CODE, No. 130, 12 C.W.N. 859.

(60) Decree attached by two persons—Sale by one attaching 'creditor'—Deposit to set aside sale—Title to deposit. See CIV. PRO. CODE, No. 203, 12 C.W.N. 800.

Execution of decree—(Continued).

(61) Application for transmission of decree—Execution—Court which should issue notice under S. 248, C.P.C. See CIV. PRO. CODE, No. 118, 12 C.W.N. 897.

(62) Date of issuing notice under S. 248, C.P.C.—Date on which Court orders issue of notice—Limitation. See LIMITATION ACT, No. 187, 5 A.L.J. 524.

(63) Application to set aside sale for non-issue of notice to applicant—Sale at an undervalue—Order dismissing application not covered by S. 312, C.P.C.—Order covered by S. 244 (c), C.P.C.—Appealable as decree—Previous execution of decree does not make S. 244 (c) inapplicable. See CIV. PRO. CODE, No. 210, 10 Bom. L.R. 752.

(64) Sale—Property purchased subject to a mortgage—Purchaser's right. See DECREE, No. 6, 35 C. 877.

(65) Questions arising in execution—Legal representatives of debtor—Decree-holder—Sons of a deceased Hindu debtor can raise question of illegality or immorality of their father's debt, in execution proceedings—Separate suit, not permissible—Limitation. See CIV. PRO. CODE, No. 153, 10 Bom. L.R. 939.

(66) Sale in execution of decree for share of rent—Effect. See REG. VIII of 1819 (PUTNI), No. 1, 8 C.L.J. 554.

(67) Reversioners brought on record as Hindu widow's representatives—Competency to object in execution—Suit by reversioners for declaration that property was not liable to be sold in execution—Maintainability. See CIV. PRO. CODE, No. 150, 5 A.L.J. 745.

(68) Question whether property, subject of mortgage-decree, belongs to judgment-debtor or stranger to be tried in regular suit and not in execution. See HINDU LAW (WILL), No. 4, 8 C.L.J. 20.

(69) Power of Court in execution to grant instalments in payment of decretal debt under S. 20, Dekkhan Agriculturist's Relief Act, even where instalments are refused at the time of the decree. See ACT XVII of 1879 (DEKKHAN AGRICULTURIST'S RELIEF), No. 8, 10 Bom. L.R. 577.

(70) Right of mortgagor, not paying money on date fixed by decree against him, to obtain possession of property in execution-proceedings—Proceedings subsequent to decree for sale under S. 88, Transfer of Property Act, nature of. See TRANSFER OF PROPERTY ACT, No. 55, 3 M.L.T. 281.

Execution of decree—(Concluded).

(71) Applicability of rule of *res judicata* to execution proceedings. See RES JUDICATA, No. 6, U.B.R. (1907), Civil Procedure, 1.

(72) —of simple money decree, sale in pursuance of—S. 99 of the Transfer of Property Act, effect of, before and after such sale. See TRANSFER OF PROPERTY ACT, No. 68, A.W.N. (1908), 49

(73) Judgment-debtor's partner's bid not accepted on first day of sale—Subsequent understanding between partner and the decree-holder not to bid against each other and that partner would get property for decree amount—Property purchased by decree-holder—No fraud by decree-holder to justify cancellation of sale. See FRAUD, No. 2, 13 C.W.N. 18.

(74) Application for execution of decree against a wrong person or dead person—*Bona fide* mistake—Stop in aid of execution. See LIMITATION ACT, No. 128-a, 35 C. 1047.

(75) Decree transmitted to another Court for execution—Suit between decree-holder and judgment-debtor in Court to which decree transmitted—Court executing decree competent under S. 243, C.P.C., to stay execution pending suit. See CIV. PRO. CODE, No. 132-a, 130 P.R. 1908.

(76) Execution of decree for rent due—Third person's property unintentionally sold in execution—Plaintiff omitting to notify that goods were his—Plaintiff's conduct no estoppel. See TORT, No. 5, 129 P.R. 1908.

(77) Right to recover losses and expenses contingent on an uncertain future event—See DECREE, No. 7, 2 Sind. L.R. 38.

Executor.

(1) Will—*Executor who once acts under a will cannot renounce the duties*—Practice—Suit for accounts from executor—Application to take accounts on the footing of wilful default—Practice as to making the application—How suing the executor for accounts—Limitation—Limitation Act (XV of 1877), S. 10, Sch. II, Art. 120.

In law a very small interference or intermeddling with the estate of his testator, on the part of a party appointed executor under a will, is sufficient to charge him with liability as executor.

An executor, once having acted unquestionably as an executor, cannot renounce that character and all the liabilities which attach to it; having once acted, the subsequent renun-

Executor—(Continued).

ciation is void, and he continues liable to be sued in the character of an executor (a).

In an action against an executor for accounts, it is not necessary, when making a reference to the Commissioner to take accounts to, give leave to the plaintiff to make an application to have accounts taken on the footing of wilful default pending the reference. Modern practice allows of an order charging wilful default being made at any time during the continuance of the action on a proper case being shown.

In a suit brought by the plaintiff against the executors of the will of her grandfather, praying for a declaration that in the events that had happened, she was entitled absolutely and solely to the property left by her grandfather, and for account of the property in the hands of the executors, the plaintiff is only entitled to accounts from the defendants for six years preceding the suit, as she took no interest under the will and the executors were not trustees for her and the property did not vest in them for any specified purpose in her favour. Such a suit is not a suit for the purpose of following trust property in the hands of the Executors and Trustees. **Ayshabai v. Ebrahim Haji Jacob**, 10 Bom. L.R. 117=32 B. 364 = 3 M.L.T. 379.

DAVAR, J.

Reference —(a) 1 Y & J. 409, followed

(2) *Also residuary legatee—Mortgage by—Legatee's right to impeach—Legacy charged on immoveable property—Priority—Notice—Constructive notice—Delay—Consent*

A mortgage by an executor, who is also residuary legatee, to secure his private debt, though valid as against creditors, may be set aside, even at the suit of a pecuniary legatee, for, the nature of the claim of a legatee may be ascertained from the will, whereas, if a reasonable time has elapsed since the death of the testator and then the executor deals with the residue as his own, the purchaser may, in the absence of notice to the contrary, assume that the debts have been paid or that there are other assets for payment of the debts, if any (a).

When the mortgage was executed years after the time fixed in the will for payment of the legacy and the legacy had remained unpaid, the lapse of time was a circumstance that might be taken into consideration in determining whether the executor was acting with the consent of the legatee.

Executor—(Concluded).

Held, that in the circumstances of the present case the rights of the parties remained unaffected by the delay. **The Bank of Bombay v. Suleman Somji**, 12 C.W.N. 993 (P.C.).

LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOBLE AND SIR ARTHUR WILSON.

References —(a) 1 Ch. 968, D., 17 L. R. (Tr.), 361, R.

(3) Person who owes money to the deceased accepting the executorship—Debt becomes at once assets—Limitation would not run as long as executorship remains. See LIMITATION, No. 5, 10 Bom. L.R. 346

(4) Right of one of several executors to challenge genuineness of will, of which probate had already been granted and from which he applied to have his name struck out. See PROBATE, No. 2, 12 C.W.N. 572.

(5) Executor—Power to possess estate as against Court of Wards claiming on behalf of residuary legatee. See COURT OF WARDS, No. 1, 12 C.W.N. 1065

(6)—of Mahomedan takes whole estate of testator, under Probate and Administration Act, and is trustee. See MAHOMEDAN LAW (PARTITION), No. 1, 13 C.W.N. 153.

Executor de son tort

Position of administrator *pendente lite* after suit—Interference. See ADMINISTRATOR, No. 1, 12 C.W.N. 237.

Ex parte decree.

(1) *Practice—Suit set down for hearing before the date fixed in summons—Civ. Pro. Code, Ss. 68, 69, 96, 100, 101, 112 and 113—High Court Rules, Nos 111 and 112.*

The plaintiff is not entitled to have a suit set down for an *ex parte* decree before the date fixed in the summons for the hearing of the suit, even though the defendant has not filed his written statement within four weeks from the date of the service of the summons as required under Rule 111 of the High Court Rules. **Dhirajlal Panachand v. Hormusji Edulji Bottlewalla**, 10 Bom. L.R. 301.

SIR LAWRENCE JENKINS, C.J., AND BACHELOR, J.

(2) *Application for setting aside ex parte decree—Where security is required on such application—Whether such security should*

Ex parte decree—(Concluded).

not be excessive—Whether such security should not be in excess of the value of the mortgaged property in suit.

Where on an application to set aside an *ex parte* decree passed in a suit on a mortgage bond, whereby property is mortgaged for Rs. 6,000, which is presumably worth more than that sum, an order is made directing the *ex parte* decree to be set aside on the defendants furnishing security for Rs. 10,000, and on their failure to do so, upholding the decree.

Held that the security required by the lower Court was excessive, and it was ordered that the security be reduced to Rs. 1,000 to be furnished within a month from the date of the order and that, on such security being given, the case should be restored to the file for trial. **Maung Sein v. Armugam Chetty**, 14 Bur. L.R. 214.

IRWIN, O.C.J., AND ORMOND, J.

(3) Application, on behalf of minor, for adjournment, to enable production of evidence, rejected—Vakil of minor, who presented application, informing Court that he had no instructions, and abstaining from taking further part in case—Minor not represented by guardian *ad litem*—Decree passed against minor whether to be considered *ex parte*. See Civ. Pro. CODE, No. 95, 3 M.L.T. 225.

(4)—, conditions precedent to setting aside—Duty of Court where conditions not fulfilled—Defect whether cured by subsequent deposit of decretal amount. See SMALL CAUSE COURTS ACT (IX OF 1887), No. 1, 5 A.L.J. 295.

(5) Appeal from *ex parte* decree and application to set it aside, whether may be proceeded with simultaneously. See Civ. Pro. CODE, No. 91, 12 C.W.N. 885.

(6)—against karnavan—Right of seshagars to contest validity of the decree in a fresh suit. See MARUMAKKATHAYAM LAW, No. 3, 23 T.L.R. 41.

(7)—against several defendants—One of the defendants applying to have it set aside—Court setting aside decree as against all defendants—Validity. See Civ. Pro. CODE, No. 93, 4 M.L.T. 230.

(8) Adjourned date of hearing—Party not appearing after filing written statement—Can apply to set aside decree. See Civ. Pro. CODE, No. 92, 4 M.L.T. 216.

Experts.

(1) Market-value of land—Opinion of expert witnesses as to value—How far expert evidence to be guide. See ACT I OF 1894 (LAND ACQUISITION), No. 14, 10 Bom. L.R. 907.

(2)—with special skill employed to supply particular boilers—Duty to exercise skill without relying on others—Failure—Negligence—Damages. See CONTRACT ACT, No. 15, 13 C.W.N. 59.

(3) Expert opinion, value of. See LUNACY, No. 1, 10 Bom. L.R. 1004.

(4) In cases under the Land Acquisition Act, Courts rely far more on evidence of sale than on expert opinion. See ACT I OF 1894 (LAND ACQUISITION), No. 3-a, 10 Bom. L.R. 675.

Fair comment.

Limits of newspaper criticism—Imputing commission of criminal offence to person whether. See LIREL, No. 1, 12 C.W.N. 490.

Family arrangement.

—agreement among co-parceners not to partition, to what extent binding—Consideration. See HINDU LAW (PARTITION), No. 2, 12 C.W.N. 793.

Fatal Accidents Act.

See ACT XIII OF 1855.

Financial Commissioner, Punjab.

Authority of, over litigation in which Government is concerned. See Civ. Pro. CODE, No. 249, 104 P.R. 1908.

Fishery.

(1) *Independent julkar*—Proof—Navigable river—Survey map—Map for private purposes—Comparative value.

Unless a person can establish his right to a fishery, independent of his right to his estate, he can have no title to any such right in a navigable river, or any part thereof lying outside the boundaries of his estate.

What evidence is necessary to prove the grant of an independent right of fishery in a navigable river discussed.

Upon the documentary evidence it was held that the lower appellate Court was in error in finding that plaintiff had proved an independent julkar.

The presumption of law is that, in the absence of evidence to the contrary, survey maps prepared for public purposes by responsible

Fishery—(Concluded).

officers of Government are entitled to more reliance than maps prepared for private purposes in a private suit. **Mathura Nath v. Sib Chandra Bose**, 12 C.W.N. 334.

BRETT AND SHARFUDDIN, JJ.

- (2) *Public navigable river, fishery in—Arm of the river ceasing to be an arm of a flowing river, effect of.*

When, on account of a change in the course of a public navigable river, an arm of the river ceases to be an arm of the flowing river, the person who had a right of fishery in the river ceases to have any right to it; it becomes the property of the adjacent owner. **Ishan Chandra Dass Sarkar v. Upendra Nath Ghosh**, 12 C.W.N. 559.

HARINGTON AND HOLMWOOD, JJ.

References:—21 W.R. 27; 32 C 1141, W R (1864), 108, R.

- (3) *Fishery rights on certain portions of land—Transfer of land by sale certificate—Whether fishery rights can exist separate from the land.*

Fishery rights in water in certain burrow-pits cannot exist separate from the land, and such rights would not remain after the transfer of such land to a stranger. **Sarat Chunder Roy Chowdhry v. Jatindra Nath Mukerjee**, 35 C. 614.

BRETT, J.

- (3-a)—right, grant of, independently of interest in land. See ACT VIII OF 1885 (BENGAL), No. 24, 7 C.L.J. 152.

- (4)—rights, whether land within meaning of Land Acquisition Act—Whether a right to be acquired under the Act. See ACT I OF 1894 (LAND ACQUISITION), No. 1, 7 C.L.J. 445

Forest Rights.

—, Suit to recover money payable in respect of—Three years' rule of limitation laid down in Sch. III, Art. 2, cl. (b) of the Bengal Tenancy Act—Money payable in respect of—not rent under S. 3 of the Bengal Tenancy Act. See ACT VIII OF 1885 (BENGAL), No. 24, 7 C.L.J. 152.

Forfeiture.

(1) Effect of forfeiture of ancestral property of a criminal, subject to Punjab Customary Law, for absconding or committing a crime, on right of inheritance of his male lineal descendants or collaterals—Extent of interest thus forfeited. See CRIM. PRO. CODE, No. 1, 19 P.W.R. 1908.

Forfeiture—(Concluded).

(2)—of tenant's rights—Tenant not denying his tenancy but denying landlord's title—Disclaimers. See LANDLORD AND TENANT, No. 7, 12 C.W.N. 525.

(3) Denial of title by one of several joint lessees—Forfeiture—Receipt of rent from tenant after denial of landlord's title—Effect. See TRANSFER OF PROPERTY ACT, No. 78, 12 C.W.N. 587.

(4) Lessee's failure to renew lease. See TRANSFER OF PROPERTY ACT No. 76, 4 M.L.T. 315

Forma Pauperis.

(1) Party suing in, not satisfied with prothonotary's decision—Application to judge in chambers. See HIGH COURT RULES (BOMBAY), No. 2 9 Bom. L.R. 475.

(2) Suit in—Withdrawal of suit on compromise—Payment of Court-fees. See CIV. PRO. CODE, No. 249, 104 P.R. 1908.

Fraud.

- (1) *Pleadings, statements in—Particulars should be given—Issue on fraud—Practice.*

Where fraud is set up, the particulars of it must be given and it must be based upon a specification of the acts relied upon as constituting fraud. Where no such particulars are given in the plaint, the Court must require the plaintiff to amend his plaint by specifying the fraud alleged, and in case of failure by him to amend, the Court should refuse to enter into the question.

It is desirable to impress upon Subordinate Judges the supreme importance and necessity of insisting that a case of fraud shall not be the subject of a mere vague allegation in the plaint or written statement; but that it shall be supported by particulars: and that, if that condition is not complied with, the party relying on a case of fraud, shall not be allowed to raise that case in the form of an issue. It is generally advisable, indeed, when framing an issue on the point of fraud, to set forth in the issue itself a brief statement of the fraud alleged, or at least to refer to the passage in the pleadings where it is specified. **Balaji Raoji Kolhe v. Gangadhar Ramkrishna**, 10 Bom. L.R. 276=32 B. 255.

CHANDAVARKAR AND KNIGHT, JJ.

- (2) *Sale—Setting aside of sale—Respondent in England—Service—Practice.*

Where, on the first day of sale, the judgment-debtor's partner's bid was not accepted and, on

Fraud—(Continued).

the second day, there was some understanding between her (the partner) and the decree-holder that they would not bid against each other but that she would get the property back for the amount of the decree, and the property was purchased by the decree-holder,

held, that there was no fraud on the part of the decree-holder which would justify a Court in setting aside the sale.

The respondent having left for England, notice of the appeal was served on him through appellant's agent in England appointed for that purpose, the notice having been made over to the appellant's vakil, who transmitted it for service to the agent in England. **Satish Chandra Mukerji v. Col. A. R. Porter**, 18 C.W.N. 18=4 M.L.T. 421.

RAMPINI, C.J., AND RYVES, J.

References :—23 M. 227 (P.C.), *relied on*; 19 M. 315, R. and 7 C. 346, *Dist.*

(3) *Colourable and collusive transaction between two parties—For defrauding a third party—Decree upholding transaction as valid—Effect of decree upon subsequent suit between same parties—Party precluded from setting up his own fraud—Public policy—Res judicata—Estoppel—Compassing object of the fraud unnecessary.*

Where two parties enter into a sham transaction with a fraudulent intention, and such sham is kept up by one of the parties in a suit between them and a third party, the action of such party is none the less fraudulent and collusive, even though, as the result of that suit, the fraudulent transaction has not benefited the other party. And where a decree is passed in such suit, upholding the transaction as valid and binding, the party cannot subsequently be allowed to allege his own fraud for the purpose of escaping from the consequence of the decree thus fraudulently and collusively obtained (a) —*Per Miller, J.*

Where the decree of a Court has been passed, upholding a certain transaction between the parties to a suit, neither party will be afterwards allowed to say that the decree was the result of a collusive arrangement arrived at by them in order to carry out a scheme of fraud, and that it should therefore be treated as a nullity, and the state of things which existed previously to the passing of such decree be restored. —*Per Abdur Rahim, J.*

Fraud—(Continued).

The decree in the last case is regarded as a subsisting and effectual decree, so that the question covered by it is treated as *res judicata*; —*Per Abdur Rahim, J.*

Also, where two persons have combined to defraud a third person and succeeded in their effort, without obtaining a decree of the Court, the Court will not permit one of the parties to show that the transaction between him and the other party to the fraud was not really what it purported to be, and that it does not therefore bind him. In this case the Court refuses on grounds of public policy to help a man who by his act has imposed upon another, to get rid of the consequences of that act against himself (b). —*Per Abdur Rahim, J.*

Even where there was no actual necessity in the suit for propounding the nominal and colorable nature of the transaction, still the putting the contrivance into use, with a view to effectuate the fraud, is sufficient to estop the party from setting up the shamness of the transaction. —*Per Abdur Rahim, J.*

The effect of an apparent transaction, generally, —and especially when such transaction has been confirmed by the decree of a Court, —cannot be got over by showing that the real transaction was something different (c). —*Per Abdur Rahim, J. Kondeti Kanna Rao v. Lolla Nukamma*, 4 M.L.T. 331.

MILLER AND ABDUR RAHIM, JJ.

References. —(a) 10 M. 17, 18 M. 378 and 20 M. 326, F., 35 C. 551, D (b) 11 B 708; 12 M. 378 and 20 M. 326, R. (c) 27 M. 28, D.

(4) —by co-partner while acting on his own separate account and not as firm's agent—Whether such fraud imputable to firm—*Hatchitta*—Material alteration by partner to set up exclusive title to debt—Suit on behalf of firm, maintainability of—Whether claim to be disallowed to the extent of fraudulent partner's interest—Apportionment before dissolution. See **PARTNERSHIP**, No. 1, 12 C.W.N. 716.

(5) Puffing statements, if fraudulent. See **COPYRIGHT**, No. 1, 12 C.W.N. 758.

(6) Letters of Administration obtained by fraud—Effect on position of such administrator—Validity of receipts granted by him for all moneys received by him as such. See **LETTERS OF ADMINISTRATION**, No. 2, 12 C.W.N. 802.

Fraud—(Concluded).

(7) Party seeking to avoid contract on the ground of fraud or undue influence—Party must give in his pleadings full particulars of the circumstances on which he relies—Broad generalisations not sufficient. See *UNDUE INFLUENCE*, No. 1, 8 C.L.J. 135.

(8)—can never be assumed, but must be proved. See *ACT XVIII OF 1884 (PUNJAB COURTS)*, No. 6, 143 P.W.R. 1908.

(9) Allegations of fraud must be specific—General allegations insufficient. See *AUCTION SALE*, No. 1, 13 C.W.N. 87.

(10) Suit for declaration that decree was fraudulent—Further relief See *SPECIFIC RELIEF ACT*, No. 9, 8 C.L.J. 485

Fraudulent transfer.

(1) *Sale of property to defeat claim of creditor—Good faith—Burden of proof.*

A owed a certain sum of money to a creditor. When the latter was pressing for payment, the debtor executed a deed of sale of certain immoveable property to his brother. Subsequently, the creditor sued the debtor, obtained a decree and sued for a declaration, that the property in question was the property of his debtor alleging that the sale was a fraudulent and collusive one, in order to defeat the plaintiff's realising his debt. *Held*, the circumstances of the case showed that the debtor placed the property, by means of the sale, beyond the reach of his creditors, and that it was fraudulent. *Held*, also, the burden of proving that he bought the property, in good faith and for valuable consideration lay upon him. *The Dwe v. A. L. V. R. S. Allagappa Chetty*, 4 L.B.R. 211.

HARTNOLL, J.

References:—25 B. 202, R.; 5 Bom. L.R. 142, F.

(2)—of property—Fraudulent intention never carried out—Suit to recover such property—Conditions for recovery of such property—Burden of proof. See *TRANSFER*, No. 1, 4 N.L.R. 26.

Freedom of Religion Act.

See *ACT XXI OF 1850*.

Full owner

Juristic definition of—Whether full owner in possession can, by his crime or absconding, cause forfeiture of reversioner's interest. See *CRIM. PRO. CODE*, No. 1, 19 P.W.R. 1908.

Future wages.

Decree directing payment out of—See *CONSTRUCTION (OF DECREES)*, No. 1, 4 M.L.T. 330.

General Clauses Act.

(1) S. 2 (12)—Agent to the Governor at Vizagapatam, whether a District Judge. See *ACT VII OF 1889 (SUCCESSION CERTIFICATE)*, No. 2, 18 M.L.J. 252.

(2) See *ACT X OF 1897*.

(3) See *ACT I OF 1899 (BENGAL)*.

(4) See *ACT I OF 1904 (BOMBAY)*.

Gift.

(1) *Father giving land to sons—Sons dead—Son's wife and children suing father for possession—Entry in revenue register by thugyi—Entry to the effect that father sent sons with letter declaring his wishes—Report to thugyi could not effect the gift—Children wrongly joined as plaintiffs—Duty of Subordinate Court—Pyatbaing, meaning of—S. 35, Evidence Act.*

The plaintiffs alleged that P.G., their husbands' father, gave his paddy land to his sons and transferred it to their names in the revenue register. On the death of their husbands they and their children brought a declaratory suit against P.G. and prayed for possession of the land. The evidence in the case consisted of an entry made by a *thugyi* or revenue surveyor in the revenue register, the entry being that P.G. sent his sons with a letter declaring his wishes. The plaintiffs did not allege that the gift in question was effected by the report to the *thugyi*;

Held that what the plaintiffs had to prove was gift made, and that the report to the *thugyi* could not effect the gift;

Held, also, that the entry could only be proved with the letter that accompanied it, but not otherwise

Held, further, that their children were wrongly joined as plaintiffs, as they had no rights to possession of inherited property during the lifetime of their mothers.

The duty of a Divisional Judge is to follow, not criticise, the rulings of the Chief Court, to which he is subordinate.

A *pyatbaing*, as its name implies, is the foil cut out of revenue register IX, and given to the person who reports any matter to the *thugyi*.

When a *thugyi* or revenue surveyor is examined, he may be asked to prove that he made entries in the ordinary course of his duty in

Gift—(Continued).

revenue register IX, and those entries may be put in evidence under S. 35 of the Evidence Act:—*Maung Po Gaung v. Ma Shwe Bwin*, 14 Bur. L.R. 30=4 L.B.R. 231.

IRWIN, J.

(1-a) *Imperfect gift—Court's power to construe it as trust—Trust—Creation of trust—Donor's intention and acts—Indian Trusts Act (II of 1882), Ss. 5, 6.*

Where there has been a clear intention to make a gift, but on account of some omission on the donor's part, that intention has failed, the Courts will not erect a trust on the imperfect gift (a).

Where the intention is to make a gift, and the intention has failed for want of transfer, or any other cause, the Courts will not convert what was meant to be an out and out gift into a trust. The intention in doubtful cases, may be shown in favour of the contention that, although words of present gift were used, a trust as meant by the donor or settlor having done everything in his power to divest himself of the beneficial ownership, more especially in the way of interest. Where, however, the Courts can find from the facts of any individual case, that although the words used are words of present gift, there was an unmistakable intention of the donor to constitute himself a trustee and to create a trust, effect may be given to the true intention. The question whether the donor intended to make an out and out gift or only to create a trust, is one of fact in each case (b).

In the case of a gift the donor must intend to part entirely with the property at the moment of completing the gift. If he expresses that intention, but fails to carry it out, there will be an imperfect gift which the Courts will not convert into a trust. But where the donor or the grantor uses words of present gift, but has no intention of parting with the property, but only with the beneficial interest, it might be right to look to the real meaning rather than to the verbal form, and, if that real meaning can be positively ascertained, give effect to it.

It is clearly necessary to the creation of a trust that the author of the trust should express that intention in some words which can leave no doubt that he did mean to accept the position of a trustee. Conduct which might be deemed conclusive in England is very likely to be a treacherous and misleading guide in India where the conditions of life are often widely different from those which prevail in the west.

Gift—(Concluded).

Reading Ss. 5 and 6 of the Indian Trust Act, 1882, together, the legislature seems to have meant that a specific oral declaration of trust on points (a) to (d) would be enough to create a trust without transfer where the author was himself the trustee. *Manchershaw S. Narielwalla v. Ardeshir S. Narielwalla*, 10 Bom.L.R. 1209.

BEAMAN, J.

References:—(a) 4 De G.F.J. 274, F.; 34 Beav. 623. D. (b) 17 Ch. D. 416; L.R. 19 Eq. 233; L.R. 18 Eq. 14, R.

(2) Deed of gift limiting rights of donee—Condition that donee should keep property for life—Declaration that donee or his heirs to have no claim to property given—Construction—Absolute ownership conferred on donee. See CUSTOMS (PUNJAB) INHERITANCE AND SUCCESSION, No. 2, 72 P.W.R. 1908.

(3)—of immoveable property—Deed registered after the donor's death—Validity. See TRANSFER OF PROPERTY ACT, No. 80, 10 Bom. L.R. 536.

(4) Unregistered instrument—Invalid—Donor's tenant attorning to donee. See TRANSFER OF PROPERTY ACT, No. 81, 4 M.L.T. 327.

(5) Awans of Pind Dadan Khan *tahsil* of Jhelum District—Gift by father of self-acquired land to daughter and her inheriting such land, distinction between, as affecting daughter's powers of disposition. See CUSTOMS (PUNJAB)—INHERITANCE AND SUCCESSION, No. 13, 121 P.R. 1908.

(6) Transfer of property in lieu of dower debt is a sale, not gift. See MAHOMEDAN LAW (DOWER), No. 3, 13 C.W.N. 160.

(7)—by a Sikh Jat in favour of issue from Mahomedan woman—Validity. See MAHOMEDAN LAW (LEGITIMACY), No. 1, 190 P.L.R. 1908.

(8)—by father in favour of daughter of agricultural land—Daughter marrying in another district—Refusal of sanction by Deputy Commissioner—Revision. See ACT XIII OF 1900 (PUNJAB LAND ALIENATION), No. 2-a, 8 P.W.R. 1908 (REV.)

Good faith.

Proof of—of a transaction where one party stands in fiduciary relationship to another—All accounts forming basis of contract need not be proved. See CIV. PRO. CODE, No. 1, 12 C.W.N. 1102.

Government.

Authority of Financial Commissioner, Punjab, over litigation in which, is concerned—Right of Government Advocate to represent Secretary of State. See CIV. PRO. CODE, No. 249, 104 P.R. 1908.

Government Kist.

Whether enhancement in Government Kist payable by mortgagor or mortgagee—Law requires mortgagee to bear burden if not relieved by his contract—Question depends on construction of mortgage-deed. See CONSTRUCTION (OF DEEDS), No. 4, 18 M.L.J. 31.

Government Tenants Act.

See ACT III OF 1893 (PUNJAB).

Grama Natham.

Right of Revenue authorities to grant portions of grama natham—Common Law of the country—User of the site by villagers.

According to the Common Law of the country, the control of "Grama Natham" vests in the Revenue authorities, and they are at liberty to grant portions of it at their discretion to persons who apply for it for building purposes. Until it is appropriated in this way to the use of some definite person, it is usual for the villagers to make use of it in any way that suits them best. They throw rubbish on it, graze their cattle on it, use it as a latrine and the like, and they are rarely interfered with. But it is always understood, that this use is permissive on the part of the Government, and that the Government has the right at any time to appropriate it for any special public purpose, or grant it to an individual for building purposes. **The Collector of the Godavari District v. Jannayula Pedda Rengayya**, 4 M.L.T. 440.

BENSON AND BHASHYAM AIYENGAR, JJ.

Grant.

- (1) *Reg. XIX of 1793—S. 37, Act XI of 1859—Sale of the village in question under the provisions of Act XI of 1859—Suit by purchaser for recovery of possession or for assessment of rent and mesne profits—Right created under grant, an encumbrance.*

Some years before the grant of the Dewani to the East India Company, a Zemindar, who held certain villages under the Mahomedan Government, made a rent-free grant of a certain village, the subject-matter of the dispute in the present case, to one D. The grant being rent-free, D and his heirs continued to be in possession of the village as rent-free from the time of the grant to the date of the Dewani and thereafter until

Grant—(Concluded).

the present day. After the acquisition of the Dewani by the East India Company, attempts were made to re-assess all the lands in the Bengal Province, and in 1773, a settlement of the villages including the village in question was made and the said village was assessed at a certain amount, the assessment being accepted by the Zemindar. The Zemindar took upon himself the liability to pay the revenue assessed on the village in dispute and continued to pay the same. The proprietors of the estate fell into arrears of the September kist of 1900, and the village was sold under Act XI of 1859. Whereupon the purchaser instituted a suit for recovery of possession or for assessment of rent of the said village and for *mesne profits*. *Held*, that the right created under the grant was an encumbrance, and that the encumbrance was created before the Permanent Settlement. The purchaser (the plaintiff) could not be affected by the laches of the defaulter or his predecessors. He was entitled to hold all the lands of the estate in the same condition as they were at the time of the Permanent Settlement. He was entitled to recover the amount assessed at the time of the Permanent Settlement, with cesses according to the Cess Act.

Held also, that S. 37 of Act XI of 1859 does not avoid encumbrances of every kind nor does it allow the purchaser to assess rent higher than that paid from before the Permanent Settlement, notwithstanding that no rent was levied from a long series of years; the rent is not enhanceable according to the law now in force, as the lands must be considered to be comprised in a tenure existing from before the Permanent Settlement. **Brindaban Behari Lal v. Bhanwari Sahai**, 35 C. 931.

MITTRA AND BELL, JJ.

Reference :—11 M.I.A. 152, R.

- (2) Endowments for religious purposes and personal grants—Applicability of S. 4 of Pensions Act. See ACT XXIII OF 1871 (PENSIONS), No. 1, 17 M.L.J. 549=3 M.L.T. 104.

(3)—By Government of revenue of a village—Grantee can bring under cultivation uncultivated or unassessed land and profit by it. See PRACTICE, No. 1, 10 Bom. L.R. 531.

(4)—relating to establishment and maintenance of Thakurs—Right of Hindu widow to question validity of such grant by her husband in his will. See HINDU LAW (WILLS), No. 5, 12 C.W.N. 808.

- (5) See CONSTRUCTION OF DEEDS.

Guardian and Minor.

- (1) *Suit for account by minor against his agent—Advances made for minor's benefit—Guardian's power to bind minor—Principal and agent.*

Where a minor comes to Court to have an account taken as between himself and his agent, and it is found on taking that account that the agent has made certain advances to the guardian of the minor and that those advances had been applied for the benefit of the minor, it was held that the agent ought to be allowed those advances in taking the accounts.

Where the plaintiff seeks relief from a Court administering equity, he must do equity himself.

A guardian cannot bind his minor ward by a personal covenant (a). **Surendra Nath Sarkar v. Atul Chandra Roy**, 34 C. 892 = 7 C.L.J. 87.

MACLEAN, C.J., AND HOLMWOOD, J.

Reference:—11 B. 551, F.

- (2) *Bond by guardian—Liability of minor—Necessaries—Bond to keep alive debt due for necessities, when binds minor's estate—Limitation—Personal liability.*

The proposition that a guardian of a minor cannot bind his ward personally by a simple contract debt, by a covenant or by any promise to pay money or damages, is subject to the modification that the promise will not bind the minor, unless it has been made merely to keep alive a debt, for which the ward's property was liable (a).

Where the promise is to pay money, which has been expended for necessities, the estate of the minor may be liable, not on the promise, but because the money has been supplied (b).

It is established law that a guardian cannot bind his ward's estate, except by a document purporting to bind it.

When a third person enters into dealings with the guardian of a minor, and advances money for necessities for the minor or for the benefit of his estate, and takes a bond for the debt from the guardian, the responsibility rests on him to take care that the bond is so drawn as to render the estate of the minor in law liable for the debt. **Bhawal Sahu v. Balj Nath Partap Narain Singh**, 12 C.W.N. 256 = 3 M.L.T. 156 = 35 C. 320.

BRETT AND HOLMWOOD, JJ

References:—(a) 26 M. 370, R. (b) 17 M. 306, R. (c) 20 B. 61, R.

Guardian and Minor—(Continued).

- (3) *Surety of guardian—Liability—Contract Act (IX of 1872), S. 128—Property not specified in the application for appointment of guardian, dealings with—Guardians and Wards Act (VIII of 1890), S. 35—Assignment of bond, if must be in writing—Mistake and misrepresentation, if ground for avoiding bond—Minor—Estoppel.*

When the bond executed by a surety on the appointment of the guardian of a minor's properties under Act VIII of 1890 did not impose any limits.

Held—that his liability extended to the guardian's dealings with properties other than those specified in the petition for the appointment of the guardian. Estoppel cannot be pleaded against a minor.

An administration bond is not invalidated by reason of mutual mistake on the part of the Court and the surety, or misrepresentation by Court (a).

The liability of the guardian extends to profits actually received, or profits which could have been received but for his gross and wilful default. He is not liable for the profits of property in the wrongful possession of a stranger.

The law does not require a written assignment by the District Judge of a guardian's bond **Sarat Chandra Roy Chowdhury v. Rajoni Mohan Roy**, 12 C.W.N. 481.

MITRA AND CASPERSZ, JJ.

References:—(a) 10 C.W.N. 673 = 33 C. 713, R.

- (4) *Minor—Removal of certificated guardian, effect on attainment of majority by—Suit instituted without next friend, effect of—Irregularity—Civ. Pro. Code, Ss. 140 and 578.*

Held that, where a guardian has been duly appointed, the ward will not attain his majority till he attains the age of 21 years, even though the guardian be removed before the ward attains that age (a).

Held further, that a suit should not be dismissed by reason of the fact that the plaint was presented by a person who was a minor at the time, but the proper course is to give an opportunity for steps being taken to have a next friend of the plaintiff brought upon the record and to prosecute the case if he so desires (b).

Guardian and Minor—(Continued).

Abdul Karim v. Muhammad Ahmad, 11 O.C. 459.

CHAMIER AND GRIFFIN, J.C.S.

References.—(a) A.W.N. (1891) 188, R.; 4 A.L. J. 597; 21 B. 281; 12 C. 612 and 10 O.C. 241, F. (b) 7 O.C. 234; 28 Revised Rep. 101; L.R. Ch. Div., 358; 18 C. 189; 21 C. 866; 23 C. 686; 19 M. 127; 30 C. 1021; 30 A. 162 and 20 A. 90, R.

(5) *Minor—Decree against a properly represented minor, when binding—Next friend—Guardian ad litem, fitness of person whose act called in question—Civ. Pro. Code, S. 443.*

Held that, as a general rule, if a minor is properly represented in a suit or proceeding by a next friend or guardian *ad litem* and there is no fraud, collusion or gross negligence on the part of the next friend or guardian, the minor is as much bound by the decree or order passed in such suit or proceeding, whether it was for his benefit or not, as if he were of full age (a).

Held further, that a minor cannot be held to have been not properly represented merely because the Court appointed as his guardian *ad litem* a person whose act was called in question in the suit.

Held also, that a Court should not appoint as guardian *ad litem* a person whose act is called in question in the suit, even though it is a case to which S. 443 of the Code of Civil Procedure applies. **Amir Chand v. Narsingh Narayan Singh**, 11 O.C. 319.

CHAMIER, J.C.

Reference.—5 O.C. 197, D.

(6) *Suit for possession of property mortgaged and sold during minority—Minor—Limitation Act, Sch. II, Arts. 12, 91 and 144.*

The property of a minor was mortgaged by his father acting as his guardian. The mortgagee instituted a suit on the mortgage in which the minor was represented by his father as guardian *ad litem*, and obtained a decree in execution of which the property was sold. The minor after attaining majority brought the present suit for possession of the property sold, with a declaration that the mortgage and sale are not binding on him, being neither for his benefit nor for legal necessity.

Held, that the suit having been instituted within 12 years of the date of mortgage is within time.

Guardian and Minor—(Continued).

Held, further, that such a suit is not barred by Arts. 12 or 91 of Sch. II of the Limitation Act (a). **Balbhaddar Singh v. Jawahir Singh**, 11 O.C. 346.

EVANS, A.J.C.

References.—(a) 16 B. 186; 33 C. 257; 14 M. 26; 34 C. 329, R. and 5 O.C. 197, *Expl.*

(7) *Guardian and Ward—District Judge's incompetency to supersede his predecessor's order appointing guardian—Removal of guardian—Maintenance—Marriage—Appeal—Guardians and Wards Act (VIII of 1890), Ss. 25, 39 and 47.*

On 9th June, 1905, E (District Judge) appointed D to be guardian of both persons and property of three minor daughters of G, nephew of D, and rejected the claim of Z and another

On 11th October, 1907, E's successor A granted D's application to arrange for the marriage of the eldest girl R.

On 18th December, 1907, A superseded the arrangement.

On 23rd December, 1907, D again applied for assistance of the Court to enable him to regain control of R.

On 24th January, 1908, A, without assigning any good reason, passed an order to the effect that D's guardianship of R should be superseded in favour of Z, and D should pay $\frac{1}{4}$ share of profits of Gulam Qadir's land to N, son of Z, for maintenance of R.

Held, that the order of 18th December, 1907, is an arbitrary one and that of 24th January, 1908, is extraordinary and undefensible.

A District Judge *suo moto* has neither power to remove a guardian nor to appoint a person whose claim has already been rejected by his predecessor.

Held, also, that, where a duly constituted guardian is willing to maintain, the Court has no power to pay out of the Ward's property maintenance charges to a person who on his own account chooses to support the minor.

Held, further, that, without assigning very good reasons, the District Judge is not justified in refusing help for restoring the minor to the control of the guardian. **Dulla v. Alahdi**, 150 P.W.R. 1908.

KENSINGTON, J.

Guardian and Minor—(Continued).**(8) Payment by guardian—Allocation of debt.**

A guardian and his ward, each owed certain sums of money to a creditor. The guardian made a payment to the creditor and did not claim to set off this amount in the minor's suits in mesne profits against her. *Held*, the payments should be allocated to that portion of the debt for which the guardian was liable. **Ambugatyanni v. Saminatha Iyer**, 3 M.L.T. 321.

WHITE AND SANKARAN NAIR, JJ.

(8-a) Existing liability—Guardian's bond—Binding on the minor

A guardian's bond, containing only a personal covenant by the guardian, without charging the minor's estate, will nevertheless bind the minor, if it is executed for a pre-existing liability which the minor is bound to discharge. **Duraisami Reddi v. Muthial Reddi**, 31 M. 458.

MILLER, J.

Reference. — 26 M. 330

(9) Minor belonging to Aliyasanthana family.

The principle, that a guardian of the property of an infant cannot properly be appointed in respect of the infant's interest in the property of an undivided Mitakshara family, applies to the case of a minor belonging to an Aliyasanthana family, where the only right of the infant is a right to be maintained in the family house. **Kajikar Lakshmi v. Maru Devi**, 4 M.L.T. 462.

MUNRO AND PINHEY, JJ

Refs — 19 C. 301; 35 C. 561 25 A. 407, F.

(10) Guardian ad litem—Appeal—Guardian ad litem—not made a party by appellant—Limitation.

Where a guardian *ad litem* of a defendant respondent was not made a party to an appeal filed by the plaintiff, until after the period of limitation for filing such appeal had expired, it was *held* that the appeal was not for this reason time barred. **Rup Chand v. Dasodha**, A.W.N. (1907), 390 = 3 M.L.T. 58 = 30 A. 55.

STANLEY, C J., AND BURKITT, J.

Reference :—4 A. 37, F.

(11) Joint Hindu family consisting of coparceners who are all minors—Jurisdiction of Court to appoint a guardian of the property of the minors as a whole—One of the minors subsequently attaining majority—Effect. See HINDU LAW (JOINT FAMILY), No. 6, 10 Bom. L.R. 279.

Guardian and Minor—(Continued):

(12)—Mahomedan mother, right of, to guardianship of minor's property—Power to make contract or refer to arbitration on minor's behalf—*Guardian ad litem*. See CIV. PRO. CODE, No. 261, 1 Sind L.R. 160.

(13) Joint Hindu family—Right of mother to be guardian of minor. See LIMITATION ACT, No. 55, 10 O.C. 367.

(14) Consideration for appointment of guardian of the person of minor. See ACT VIII OF 1890 (GUARDIANS AND WARDS), No. 2, 9 Bom. L.R. 923 = 32 B. 50.

(15) Mortgage of minor's property to secure a loan sanctioned by Court—Duty of Court to specify the rate of interest—Right of lender where rate of interest is not specified. See ACT VIII OF 1890 (GUARDIANS AND WARDS), No. 7, A.W.N. (1908), 75.

(16) Continuance of a married woman (mother) as guardian notwithstanding S. 457, Civ. Pro. Code—Validity of. See CIV. PRO. CODE, No. 257, 144 P.L.R. 1906 = 8 P.R. 1908.

(17) Certified guardian—compromising suit—Sanction of Court, if necessary—Court's duty in sanctioning compromise under S. 462, Civ. Pro. Code—Suit by minor to set aside decree, maintainability—No fraud. See CIV. PRO. CODE, No. 259, 8 C.L.J. 266.

(18) Guardian of minor applying to refer to arbitration—Leave or consent of Court, if necessary. See CIV. PRO. CODE, No. 79, 8 C.L.J. 294.

(19) Appointment of testamentary guardian by Court—His liability to furnish security. See ACT VIII OF 1890 (GUARDIANS AND WARDS), No. 8, 99 P.R. 1908.

(20) Alienation of minor's property by *de facto* guardian—Minor's liability extends only to the benefit he derives therefrom. See CUSTOM (PUNJAB) INHERITANCE AND SUCCESSION, No. 23, 136 P.W.R. 1908.

(21) Alienation by *de facto* guardian of Mahomedan minor, not being legal guardian of minor and not authorised by custom to transfer ward's property—Validity. See LIMITATION ACT, No. 58, 182 P.L.R. 1908.

(22) Alienation by remote guardian of a Mahomedan minor—Effect—Guardian being co-heir and in possession of the estate—Alienation to discharge debt—Validity. See MAHOMEDAN LAW (ALIENATION), No. 1, 1 Sind L.R. 221.

Guardian and Minor—(Continued).

(23) Manager of joint Hindu family certifying payment of a decree in favour of himself and minor members—Power of Court to demand security from manager—Civ. Pro. Code, S. 258. See HINDU LAW (JOINT FAMILY), No. 12, 11 O.C. 246.

(24) Act VIII of 1890, guardian appointed under—Right to withdraw—Discharge of guardian. See COMPROMISE, No. 1, 67 P.W.R. 1908.

(25) Guardianship is not one of the private civil rights of any private person—Dispute as to right to be minor's guardian not to be submitted to arbitration. See ACT VIII of 1890 (GUARDIANS AND WARDS), No. 1, 5 A.L.J. 101.

(26) Relation between guardian and ward, whether that of an agent to a principal—Whether resembles that of trustee to *cesti que trust*—Power of guardian to acknowledge debt due from minor—Fresh start for limitation. See LIMITATION ACT, No. 24, 5 A.L.J. 375.

(27) Suit by managing member of Mitakshara joint family for family debt—Representation of minor co-parcener as next friend—Withdrawal of decretal money from Court—Next friend if bound to furnish security. See CIV. PRO. CODE, No. 258, 12 C.W.N. 598.

(28) Transfer of property belonging to a minor—Transfer by one who is not guardian—Void or voidable. See MAHOMEDAN LAW, (GENERAL), No. 1, 11 O.C. 1.

(29) See HINDU LAW (GUARDIANSHIP).

(30) See MAHOMEDAN LAW (GUARDIANSHIP).

(31) Mother of minor allowed by Court to act for her son—No formal order to that effect on record—Presumption of her appointment by Court as guardian—Compromise decree to be considered for minors' benefit, even though no express order—Duty of Court presumed. See CIV. PRO. CODE, No. 253, 8 C.L.J. 31.

(32)—, dispute as to who should be the guardian of a—reference to arbitration, validity of. See ACT VIII of 1890 (GUARDIANS AND WARDS), No. 1, 5 A.L.J. 101.

(33) Suit by next friend—Notice to certified guardian—No formal order granting leave to next friend to sue—Presumption where Court begins trial. See CIV. PRO. CODE, No. 252, 5 A.L.J. 633.

(34) Letters of administration cannot be granted to minors under guardianship of their father. See ACT V of 1881 (PROBATE AND ADMINISTRATION), No. 2, A.W.N. (1908), 257.

Guardian and Minor—(Concluded).

(35) Contract by minor—Estoppel against minor—False and fraudulent misrepresentation by minor—Principles of liability. See CIV. ACT ACT, No. 2, 5 A.L.J. 674.

Guardians and Wards Act.

(1) See ACT XL of 1858.

(2) See ACT VIII of 1890.

Haq Bua.

Suit for declaration that plaintiffs who are occupancy-tenants, are not liable to pay—Jurisdiction. See JURISDICTION (OF CIVIL AND REVENUE COURTS), No. 1, 33 P.R. 1908 (F.B.).

Haq-i-chaharum.

(1) *Haq-i-chaharum, liability of vendee to the landlord for—Wajib-ul-ars.*

Held, that, unless the right of the landlord is limited by the *wajib-ul-ars* to a right to claim *haq-i-chaharum* from the vendor, the right can be enforced against the vendee also (a). *Utri Din v. Munshi Prag Narain*, 11 O.C. 64.

CHAMBLER AND SAUNDERS, J. C.S.

References.—(a) S.C. No. 147, N.W.P.H.C. (F.B.) Rulings 1867, 63; A.W.N. (1901), 61; S.C.A. No. 215 of 1897, *not F.*

Hereditary office.

Adverse possession—Art. 124, Limitation Act (1877) See LIMITATION ACT (XV of 1877), No. 97, 4 M.L.T. 466.

Hiba bil ewaz

A copy of Koran is a valid consideration for—. See MAHOMEDAN LAW (POWER), No. 3, 13 C.W.N. 160.

High Court

(1) *Criminal proceedings ordered by civil Court, power of High Court to stay—S. 15, Charter Act, scope of—Ss 28 29, Letters Patent—S. 476, Cr. P.C.*

The power of general superintendence given by S. 15 is not limited by any other provisions of law, and it includes the power to point out to the subordinate Courts, the inexpediency of trying a case when it is likely to interfere with the due course of justice. The power of superintendence (S. 15) and transfer (S. 29), implies the power to send for the records in any case in the lower Courts, which must necessarily stay further proceedings in that case. Therefore, the High Court has the power to stay proceedings

High Court—(Concluded).

(ordered by a civil Court) in criminal Courts till the appeal from that Court is disposed of. (a). The fact that the Court may not have the power to set aside the order under S. 476, Cr. P. C., is in itself no reason for holding the other way. *In re L. Joglah*, 4 M.L.T. 186.

SANKARAN NAIR AND ABDUR RAHIM, JJ.

References:—(a) 34 C. 848, *Expl.* B.L.R. (F.B.), 426, *not Expld.*

(2) *Power to extend time for payment, where appeals are dismissed on ground of limitation—Delay in presenting second appeals.*

Even in cases in which appeals are dismissed on the ground of limitation in presentation of the same, the High Court has power to extend the time for payment. *Yenkatapathy Aiyer v. Thirupathi Goundan*, 4 M.L.T. 341.

MILLER AND SANKARAN NAIR, JJ.

References:—18 M. 214; 22 M. 298 and 31 M. 28, F.

(3)—power of, to interfere with order of Subordinate Courts passed without jurisdiction—S. 15, Charter Act. See COMMISSION, No. 1, 3 M.L.T. 246.

(4)—in the exercise of its ordinary original civil jurisdiction, whether included in the term "District Court," in S. 29, Inventions and Designs Act. See ACT V OF 1888 (INVENTIONS AND DESIGNS), No. 1, 12 C.W.N. 446.

(5)—power of, under S. 584, C.P.C., to interfere when Subordinate Court erroneously exercised discretion by rejecting document that ought to have been received. See CIV. PRO. CODE, No. 100, 12 C.W.N. 312.

(6) Power of High Court in framing rules under S. 652, C.P.C. See HIGH COURT RULES (BOMBAY), No. 1, 9 Bom. L.R. 1138=2 M.L.T. 410=32 B. 14.

(7) Judge declaring certain persons to be toutis—Practice of High Court on application for revision of such order. See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), No. 8, A.W.N. (1908), 279.

(8) Appellate jurisdiction over proceedings of Commissioner in Insolvency. See VAKIL, No. 1, 18 M.L.J. 565.

(9) See JURISDICTION.

High Court Rules (Bengal).

Nos. 111 to 118 and 132—Attorneyship examination—Discretion of Board of examiners—Jurisdiction of the High Court to interfere. See ATTORNEYSHIP EXAMINATION, No. 1, 12 C.W.N. 373.

High Court Rules (Bombay).

(1) *Rules 17, 18 and 25—Certified copies required by the rule—Limitation Act (XV of 1877)—Civ. Pro. Code (Act XIV of 1862), S. 652—Presentation of memoranda of second appeals, &c.—Accompaniments.*

An appeal, &c., if presented in time is validly presented for the purpose of the Limitation Act if it is accompanied by copies required by the Code of Civil Procedure, 1882.

The accompaniments directed under rule 25 of the High Court Rules are extraneous to the memoranda of appeals, applications or appeals in execution, and the rule does not fix any time within which they are to accompany the memoranda, &c.

Per Chandavarkar, J.—No. rule of High Court can add to or modify the conditions and limitations of the law laid down in the Limitation Act. It is true that the Court has the power of making certain rules given it by S. 652 of the Civ. Pro. Code, and those rules must be "consistent with" the Code. But there is no power given to frame a rule modifying any rule or mode as to computation of limitation prescribed, expressly or by necessary implication, in the Limitation Act. *Shunilal Jethabai v. Dahyabhai Amulakh*, 9 Bom. L.R. 1138 (F.B.)=2 M.L.T. 410=32 B. 14.

RUSSEL, AG. C.J., CHANDAVARKAR, HEATON AND KNIGHT, JJ.

(2) *Rule 80-A 1—Pauper, petition to sue as—Prothonotary's decision—Application to Judge in Chambers.*

Under Rule 80-A 1 of the Bombay High Court Rules, it is the right of a party dissatisfied with the Prothonotary's decision, to apply to the Judge to have the matter transferred to him; and the Judge in Chambers is bound to take up the matter and decide it for himself. *Meghbhai v. Poonjabai*, 9 Bom. L.R. 475=32 B. 163.

DAVAR, J.

(3) Nos. 111 and 112—Defendant's failure to file written statement within four weeks from date of service of summons—Suit set down for an *ex parte* decree before date fixed for hearing—Practice. See EX PARTE DECREE, No. 1, 10 Bom. L.R. 301.

(4) *Rule 122—Civil Procedure Code (Act XIV of 1882), S. 491—Arrest before judgment—Damages for wrongful arrest—Damages for arrest cannot be tried by counter claim—Practice.*

High Court Rules (Bombay)—(Concluded).

Pending a civil suit against him, the defendant was arrested before judgment, but was afterwards released. He then made a claim of Rs. 25,000 against the plaintiff as damages for his wrongful arrest and applied to include in the suit his counterclaim of Rs. 25,000.

Held, that the question which the defendant desired to be tried, was not one which ought to be tried by counter-claim. **Magoomal Jethanand v. Hamid Bin Ali Bin Kamil**, 10 Bom. L.R. 1002.

MACLEOD, J.

(5) *Rule 131—Third party Notice—Application to be before filing written statement—Practice and Procedure.*

An application for a third party notice, under Rule 131 of the Bombay High Court Rules, must be made before the written statement is filed, unless special leave has been obtained from the Court. **Nippon Menkwa Kabayshika Kaisha v. Gurmukrai Sukhanand and Co.**, 10 Bom. L.R. 1024.

MACLEOD, J.

(6) *Rule 544—Taxation—Bill of Costs—Practice.*

Rule 544 of the Rules of the Bombay High Court does not empower a Judge to make an order on an attorney's application for taxation of his bill of costs, for business not transacted in Court, unless such order be by consent, and the Court has not any inherent power on which the jurisdiction can be rested (a). *In re Framji Gawaaji Marker*, 10 Bom. L.R. 76=32 B. 76.

JENKINS, C.J., AND BATCHELOR, J.

Reference :—(a) 1 S. and S. 97 (1892), followed.

(7) Rule 859, limitation for proceedings under.—See LIMITATION ACT, No. 118, 9 Bom. L.R. 508=32 B. 1.

High Court Rules (Madras).

(1) Rules of the original side of High Court of Madras—Rule 533—Right of Advocates to appear and plead instructed by vakils. See PRACTICE, No. 4, 9 M.L.T. 322.

Hindu Law.

1. GENERAL.
2. ADOPTION.
3. ALIENATION.
4. CONVERSION.
5. DEBTS.

Hindu Law—(Continued).

6. EXCLUSION FROM INHERITANCE.
7. GIFT.
8. GUARDIANSHIP.
9. IMPARTIBLE ESTATE.
10. INHERITANCE.
11. JOINT FAMILY.
12. MAINTENANCE.
13. MARRIAGE.
14. PARTITION.
15. RELIGIOUS ENDOWMENTS.
16. REVERSIONERS.
17. SCHOOLS OF LAW AND TEXTS.
18. SELF-ACQUISITION.
19. STRIDHAN.
20. SUCCESSION.
21. UNCHASTITY.
22. WIDOW.
23. WILLS.

—1.—(General).

(1) Absence of agreement as to payment of interest and of demand in writing to bring case under Interest Act—Applicability of Hindu law in such matters. See ACT XXXII OF 1839 (INTEREST), No. 1, 3 M.L.T. 278.

(2) Applicability of, to devolution of agricultural tenancy. See ACT IX OF 1883 (C. P. TENANCY), No. 1, 4 N.L.R. 9.

(3) Application of, to agricultural communities in the Punjab who are of Hindu origin. See CUSTOMS (PUNJAB), WILLS, No. 2, 11 P.R. 1908.

—2.—(Adoption).

(1) *Will—Adopted son to take after widow, if of good character—Contingent interest—Uncertainty—Implied contract on adoption not to make will.*

A Hindu, by his will gave his widow a life-interest in a house and provided that, on her death, their adopted son should have the house provided he was of good character and obedient to the widow.

Held that the condition, *vis.*, that the adopted son should be of good character and be obedient to the adoptive mother and should survive her, was a condition precedent to the adopted son taking under the will and was not void for vagueness.

Hindu Law—(Continued).**—2.—(Adoption)—(Continued).**

The adopted son had a contingent reversionary interest in the house during the widow's life-time and this was inalienable (a).

In Hindu adoption, there is no implied contract with the natural father that, in consideration of the gift of his son, the adopter will not make a will (b). **Surendra Nath Ghose v. Kala Chand Banerjee**, 12 C.W.N. 668.

RAMPINI AND SHARFUDDIN, JJ.

References.—(a) Merivale's Reports, (1816). 26, F. (b) 3 C.W.N. 415=26 L.A. 83, F.

(2) *Adoption of daughter's son—Dattaka and Kritrima forms of adoption—Pleading set up in the Chief Court but not set up in either of the Courts below—Succession to the estate left by an adopted son.*

Held, that the adoption of a daughter's son in the Dattaka form is invalid and impossible under Hindu Law among the twice born classes.

Held, also, that in Hindu Law under the Kritrima form of adoption, as also in adoptions under the Punjab Customary Law, there is no change in the adopted son's family and no relationship with the adoptive father's collateral relations, who, therefore, cannot succeed to the property left, by such an adopted son.

Held, further, that a party having, without objection, allowed issues to be struck and the case gone into by both the lower Courts on the understanding that the parties are governed by Hindu Law cannot set up the plea in the Chief Court that they are governed by custom (a). **Baij Nath v. Shamboo Nath**, 53 P.W.R. 1908=113 P.L.R. 1908.

CHATTERJEE, J.

References.—(a) 26 M.L.A. 153, F.; 147 P.R. 1889 and 21 P.R. 1890, referred to and distinguished.

(3) *Jains—Custom—Adoption of married man—Suit for declaration of invalidity of adoption—Burden of proof.*

Held that, according to the law and custom prevailing amongst the Jain community, a widow has power to adopt a son to her deceased husband without any special authority to that effect, and, if there are two widows, the senior widow may adopt without the concurrence of the junior widow. A widow is also competent, with the consent of sapindas, to give a son in adoption after the death of her husband.

Hindu Law—(Continued).**—2.—(Adoption)—(Continued).**

Held, also, that, adoption being amongst the Jains a purely secular institution, there is no legal objection to the adoption of a married man (a).

Held also that, where the plaintiff asks for a declaration that an alleged adoption is invalid, but cannot claim immediate possession by reason of the intervention of a widow's estate, the burden is still on him to make out a *prima facie* case that the adoption challenged by him is invalid in law or never took place in fact (b). **Asharfi Kunwar v. Rub Chand**, A.W.N. (1908), 79=5 A.L.J. 200=30 A. 197

STANLEY, C.J., AND BURKITT, J.

References.—(a) 29 A. 495, F.; 6 I.A. 15; 22 B. 416; 22 M. 398, 21 A. 460, R. (b) 9 W.R. 463; A.W.N. (1902), 62, F.; 1 I.A. 206, R.; 11 W.R. 468, 12 W.R. (P.C.), 1, 21 W.R. 84; 24 W.R. 107, D.

(4) *Hindu Law—Widow—Adoption by the widow—Widow succeeding to the property as gotraja sapinda*

A Hindu widow who succeeds to an estate not her husband's but as a *gotraja sapinda* of the last male holder, under the rule established by **Lallubai v. Mankubarbar** and in consequence of the absence of nearer heirs, cannot make a valid adoption. **Datto Govind Kulkarni v. Pandurang Vinayak**, 10 Bom. L.R. 692.

BATCHELOR AND CHAUBAL, JJ.

References.—26 B. 526, F.; 22 B. 416 and 23 B. 327, doubted.

(5) *Remarried mother—Power to give in adoption son by first husband—Hindu Widows Remarriage Act (XV of 1856).*

S had a daughter B, who with her husband A and son M (plaintiff) lived with him. S had a wife P, the step-mother of B. S intended from the first to adopt the plaintiff; and for three years after his death, B, P and A used to live in the family house as before; and P continued to treat the plaintiff as before as the son of S. P then went through a formal adoption ceremony in which plaintiff was given by his mother B, who had at this date contracted a remarriage, A having died some years back. The adoption was challenged on the ground that B, owing to her remarriage, had lost the right of giving her son (plaintiff) in adoption:—

Hindu Law—(Continued).**—2.—(Adoption)—(Continued).**

Held, that the adoption was good, as there was evidence of an express authority from A to B to give the plaintiff in adoption to S.

According to Hindu Law, a mother who has contracted a remarriage does not forfeit her right to give in adoption her son by her first husband. And the Hindu Widow Remarriage Act, 1856, does not afford any indication that the Legislature intended to deprive her of the right. **Putlabai Sadashiv v. Mahadu Sadashiv**, 10 Bom. L.R. 1134.

BASIL SCOTT, C.J., AND HEATON, J.

Reference.—24 Bom. 89=1 Bom. L.R. 543, *Cons*.

(6) *Rule that no adoption allowed where no marriage possible between the natural mother in her maiden state and adopting father—Limitations of the rule—Gotras—Pravars—Viruddha Sambandha.*

Under Hindu Law, the rule that there can be no adoption where there can be no legal marriage between the adopted boy's mother in her maiden state and the adoptive father is strictly confined to the specified cases of a daughter's son and the mother's sister's son.

Hence, where the natural mother of the adopted boy and the adoptive father though belonging to different gotras have two out of three pravaras in common, the adoption can be validly made.

Per Batchelor, J.—The authority of *Nanda Pandita* must be accepted except where it can be shown that he deviates from, or adds to, the Smritis, or where his version of the law is opposed to such established custom as the Courts recognise. **Ramachandra Krishna Joshi v. Gopal Dondo Joshi**, 10 Bom. L.R. 948.

BATCHELOR AND CHAUBAL, JJ.

(3) *Widow — Adoption — Alienation by the widow before adoption — Right of the adopted son to dispute the alienation.*

Where a Hindu widow, who has inherited her husband's property, adopts a son, the adoption has the effect of divesting her of the property and putting an end to her estate as heir of her husband. The adoption has the same effect as her death, with this difference, that, after the adoption, she has a right of maintenance against the adopted son during

Hindu Law—(Continued).**—2.—(Adoption)—(Concluded).**

the rest of her life, whereas such right ceases on her death. But the right of maintenance, so long as it is not a charge on the estate or any portion of it, does not confer on her any right to the estate, or entitle her to transfer it by way of sale or mortgage.

If the widow, before the adoption, severs a portion of the inheritance therefrom and transfers it to a stranger, without any proper or necessary purpose binding the estate absolutely according to Hindu Law, the transfer, logically speaking, must cease to have any effect after the adoption, since it could only operate during the time that the estate was represented by her as heir; and the result of the adoption is to terminate that estate (a). **Ramkrishna Kuppasawmi v. Tripurabai Kuppasawmi**, 10 Bom. L.R. 1029.

CHANDAVAKAR AND HEATON, JJ.

References.—(a) 11 B. 609; 19 B. 809, *F.*; 26 M. 143, *not F.*

(8) *Power to widow to adopt—Description of class to select adoptee from—Construction—See WILL, No 5, 10 Bom. L.R. 97.*

—3.—(Alienation)

(1) *Grandfather paying income of certain joint family property to his daughter—Grandson not objecting—Mitakshara 1-i-27.*

Where a grandfather merely credited to his daughter in his accounts some of the joint family property, and paid to her the income derivable from it, but the property itself was not severed from the joint estate, the fact that his minor grandson did not make a public protest against his grandfather's payment during his grandfather's lifetime, would not estop him from contesting the validity of an alienation made of the corpus of such property subsequently.

The text in Mitakshara 1-i-27 cannot be held to authorise the setting apart of a considerable portion of the family property, whether moveable or immoveable, and the partition of it among the ladies of the family (a). **Kuglii Kamakshi Ammal v. Bappula Chakrapani Chettiar**, 17 M.L.J. 405=30 M. 452=3 M.L.T. 23.

BODDAM AND MILLER, JJ.

References.—(a) 29 B. 51; 24 B. 547, 22 M. 113, *D.*

Hindu Law—(Continued).

—3.—(Alienation)—(Continued).

(2) *Will—Karar—Construction—Life estate and widow's estate—Alienation by owner of life estate, effect of—S. 51, Transfer of Property Act (IV of 1882).*

A transfer, in pursuance of the will of a testator, to his mother, stating that "the aforesaid properties should go to you for your maintenance and you shall accordingly enjoy the same all your life with right to sell or gift away" was held to confer an ordinary life estate, (a) as there were no circumstances indicating a larger grant. The expression 'with power to give and sell away' did not indicate a grant of the limited estate commonly known as a widow's estate, as the words were not apt for the purpose of conveying the right to alienate in case of necessity, or to meet expenditure which may be considered to confer spiritual benefit on the deceased testator. The words must be read along with the other words 'for maintenance' and 'for your life.'

Under the will of a Hindu testator, his wife gave certain properties, burdened with a simple mortgage created by the testator, to his mother, who, in consideration of her nephew undertaking to maintain her for the remainder of her life, gave them away to him. Upon this mortgage, a decree was obtained against the testator's wife, mother and the mother's nephew. The nephew, by private sale sold the properties to a third person, and out of the sale proceeds satisfied the mortgage debt. The testator's widow was not shown to have consented to the sale.

Held, that neither the mother (b) nor her donee, the nephew, had any power to give anything more than an estate for the life of the testator's mother, that the plaintiff, his widow, was entitled to recover the land on the mother's death, notwithstanding the existence of the mortgage decree, on payment of the decree-debt and the value of the improvements of the land, under S. 51 of the Transfer of Property Act, effected by the vendees. **Nanjamma v. Nacharammal**, 17 M.L.J. 622.

WHITE, C.J., AND MILLER, J.

References:—(a) 29 C. 699, R. (b) 62 Eng. Rep. 94, D.

(3) *Single member of family not competent to alienate his undivided share in the family property.*

Hindu Law—(Continued).

—3.—(Alienation)—(Continued).

Held that a member of joint Hindu family other than the father or managing member is not competent to alienate his undivided share in the joint family property without the consent of his co-sharers. **Jamna Prasad v. Jagdeo**, A.W.N. (1908), 163.

KARAMAT HUSAIN, J.

References:—16 A. 369, discussed; 6 C. 749, R.

(4) *Hindu Law—Widow—Alienation by—Necessity—Reversioner—Right to set aside sale.*

When a Hindu widow sells property for a consideration the whole of which was advanced by the vendee for legal necessity, a reversioner cannot get the sale set aside even on payment of the entire sale price. **Raghubar Dayae v. Akhtar Khan**, 5 A.L.J. 366=A.W.N. (1908), 173.

STANLEY, C.J., AND KARAMAT HUSAIN, J.

References:—25 A. 330; 27 A. 494, D.

(5) *Hindu Law, Mitakshara—Joint Hindu family—Co-parcener when joint alienating—Mortgagee, right of—Partition—Estoppel.*

During the subsistence of co-parcenership, a co-parcener in a joint Hindu family governed by the Mitakshara law cannot alienate his own share of the family property (a).

On the severance of the family by the decree in a partition suit, the mortgage, which was in the nature of an inchoate right, became perfected as regards the share of the mortgagor (b).

Semble. The co-parceners A and B, who purchased the interest of another co-parcener C, under the money decree obtained in a partition suit, with full knowledge of the mortgage in favour of the plaintiff by C, are estopped from contesting the right the plaintiff had (c). **Parsidh Narain Singh v. Janki Singh**, 7 C.L.J. 644.

MITRA AND CASPERSZ, JJ.

References:—(a) 3 B.L.R. 31 (F.B.), F. (b) 12 B.L.R. 90; 19 C. 401, R. (c) 14 C. 401, Diss.

(7) *Mortgage and sale of ancestral properties—Burden of proof in either case as to validity of, against interest of other members of the family.*

In the case of alienation by mortgage, by a mitakshara father or karnavan of a Malabar

Hindu Law—(Continued).**—3.—(Alienation)—(Continued).**

Tarwad, the sons should prove the illegality or immorality of the specific debt, or the non-existence of the debt (i.e., absence of consideration), and unless this is proved no relief could be given them against attachment of the family property by the creditor. But in the case of sale and assignment of mortgage security, it is the alienee that should prove the purpose for which the alienation becomes binding on the sons or that it was with the son's consent.

Held, also, that the debtors of the family had the right to pay mortgage moneys due by them to the father and obtain release. **Sivajnanam Pillai v. Arumukam Pillai Sivajnanam Pillai**, 23 T.L.R. 8.

SADASIYA AYYER, C.J., AND GOVINDA PILLAI AND MUTTUNAYAGAM, JJ.

(8) *Widow's estate—Alienation of portion of estate with consent of the reversioner—Validity*

The alienation by a Hindu widow of a portion of her husband's estate without legal necessity but with the consent of the then next reversioner is valid and binding on the actual reversioner upon the death of the widow (a). **Pulin Chandra Mandal v. Balai Mandal**, 12 C.W.N. 837=8 C.L.J. 280=35 C. 939

RAMPINI, C.J. AND RYVES, J.

References.—(a) 21 M. 128, *Diss*; 19 C. 236; 10 C. 1102; 22 C. 354; 25 B. 129; 12 C.W.N. 74=35 L.R. 1 A. 1 and 12 C.W.N. 49, *relied on*.

(9) *Alienation by a Hindu widow—Suit by reversioner—Limitation Act (XV of 1877). Sch. II, Art 125.*

A suit by a reversioner, during the lifetime of the widow, to have an alienation by her declared void, except for her life, is governed by Art. 125 of Sch. II of the Limitation Act.

Seemle. A new cause of action does not arise, when, owing to the death of the next reversioner, a remoter reversioner becomes entitled to sue.

A reversioner, whose suit under Art. 125 has been barred, may still sue for possession if he survives the widow. **Musett Mesrao v. Girjanundan Tewari**, 12 C.W.N. 857.

GEIDT AND CHITTY, JJ.

(10) *Custom—Alienation by male proprietor—Will—Jhiwars of Jugatpur Bazar, Amritsar District—Evidence—Wajib-ul-ars—Attestation of, by non-agriculturist leading men in village—Ancestral property.*

Hindu Law—(Continued).**—3.—(Alienation)—(Continued).**

Held, that the family of the parties belonging to Jhiwar caste and holding land which they did not cultivate themselves were not shown to be governed by agricultural custom and were therefore subject to their personal law.

That from the mere fact of a non-agriculturist person, who is a leading man in the village attesting a *Wajib-ul-ars* of the village, it does not follow that he meant to acknowledge that his own particular family followed the same custom as other families in the village.

Quere.—Whether land purchased by a father for the benefit and in the name of his sons is ancestral land in the hands of his son? Chatterji and Chevin, JJ., held different views on the point. **Sardar Narain Singh v. Sardar Hida Singh**, 158 P.L.R. 1908=141 P.W.R. 1908

CHATTERJI AND CHEVIN, JJ.

(11) *Joint Hindu family—Mortgage of family property by undivided member—Sale of such property by co-parcenary body to third party—Rights of vendee.*

A single member of a joint undivided Hindu family mortgaged a share in a house belonging to the joint family. The co-parcenary body afterwards sold the entire house to another person. *Held* that the vendee was not precluded from questioning the right of the mortgagor to mortgage a portion of the joint family property. **Brijbasi Lal v. Gopal Das**, A.W.N. (1908), 200.

GRIFFIN, J.

References—16 A. 369; 1 A. 429 and 2 A. 898, *R*.

(12) *Hindu Law—Widow—Alienations by the widow—Permanent lease by the widow—Necessity*

A permanent alienation of immovable property by a Hindu widow can only be justified on the ground of necessity. The necessity required involves some notion of pressure from without and not merely a desire to better or develop the estate, for this last implies vast powers of management which in practice would not easily be distinguishable from an authorisation to embark upon speculative ventures.

A Hindu widow can alienate in order to preserve the estate; but she is not entitled to

Hindu Law—(Continued).**—3.—Alienation—(Continued).**

alienate it merely in order to improve it.
Ganap Sanna Suba v. Subi Sanna Suba, 10
 Bom. L.R. 927.

BATCHELOR AND CHAUBAL, JJ.

**(13) Whether sale and mortgage by father,
 after partition of son's share in the ancestral
 property, binding on the son.**

Held that it was not open to a father to deal
 with the property of his divided son, so as to
 bind that son, and where the estate is divided,
 the father cannot sell what does not fall to him
 in the division. **Rathna Naidu v. Anjana-**
chariar, 4 M.L.T. 277.

MUNRO AND ABDUR RAHIM, JJ.

References.—28 A. 508 and 22 M. 519, R

(14) Widow alienating property—Compe-
tency of distant reversioner to maintain
declaratory suit in presence of widow's
issueless daughter—Brahmins of mouza
Sambaka, Ambala District, whether govern-
ed by custom or Hindu Law.

The Hindu Law, and not the Customary Law,
 applies to alienations effected among Brahmins
 of mouza Sambaka, Ambala District. Where a
 widow alienates certain property in her hands,
 it is competent for an heir presumptive, though
 a distant one, to maintain a declaratory suit in
 presence of the widow's daughter having no male
 issue. **Kapurja v. Mangal**, 149 P.R. 1908.

CHATTERJI, J.

References.—(a) 94 P.R. 1907, D. and (b) 22
 C. 62; 6 A. 431, 13 M. 195. *relied on*, 14 P.R.
 1895, R; 15 A. 132, D

(15) Mortgage, suit to enforce—Liability of
members, personal or otherwise—Signature
as witness, if creates liability—Limitation.

A mortgage bond was executed by two
 brothers, members of a joint Hindu family
 governed by the Mitakshara Law. On the
 death of one of the brothers, a suit was brought,
 more than six years after the due date of
 the bond, to enforce the bond against the
 property of all the members of the joint family
 including the mortgagor who was alive, the
 sons and grandsons of the deceased mortgagor
 and the son of the surviving mortgagor.

Held, that the mortgagee is entitled only to a
 mortgage decree against the mortgagor who is
 alive, that he has a right only to a personal

Hindu Law—(Continued).**—3.—Alienation—(Continued).**

decree against the other defendants and that
 the suit, brought more than six years after the
 due date of the bond is barred by limitation as
 against these defendants other than the mort-
 gagor (a).

The fact that a son of the deceased mortgagor
 signed the mortgage bond as a witness does not
 render him liable as if he were one of the mort-
 gagors. **Bhagawat N. Chowdhury v. Suba**
Lal Jha, 7 C.L.J. 195.

RAMPINI AND CASPERSZ, JJ.

References.—(a) 27 C. 762, F: 15 A. 75, *not*
F.

(16) Foreclosure of mortgage—Sons not made
parties—Right of sons to redeem—Act IV
of 1882 (Transfer of Property Act), S. 85.

The mortgagees of a mortgage of joint family
 property executed by the father alone sued for
 and obtained a decree for foreclosure. At the
 time the suit was instituted the mortgagees
 knew that there were sons and grandsons joint-
 ly interested with the mortgagor in the mort-
 gaged property, but, notwithstanding this, they
 omitted to make them parties to their suit.

Held that the sons and grandsons were not
 precluded from instituting a suit for redemp-
 tion. **Ram Prasad v. Man Mohan**, A. W. N.
 (1908), 106 = 5 A.L.J. 267 = 30 A. 256.

AIKMAN AND KARAMAT HUSSAIN, JJ.

References.—17 A. 537, R; 25 A. 214, D.

(17) Mortgage by uncle for personal benefit,
validity of—

Appellant held a decree against his uncle
 Gendan and got him arrested in execution.
 Gendan Lal in order to pay him executed a
 mortgage bond hypothecating a joint family
 property to the respondent. The joint family
 consisted of himself and appellant. The credi-
 tor sued appellant who pleaded that his uncle
 could not hypothecate joint family property
 to pay up a decree which he (appellant) held
 against him.

Held, (Stanley, C.J., and Banerji, J.), that
 appellant's plea must prevail.

Distinction between powers of a manager
 who is a father and a manager who is not a
 father pointed out. **Ram Ratan v. Lachman**
Das, 5 A.L.J. 417 = A.W.N. (1908), 192.

STANLEY, C.J. AND BANERJI, J.

Hindu Law—(Continued).**—3.—(Alienation)—(Continued).**

(18) *Champerty—Assignment—Validity, if may be questioned by third parties—Consideration made payable upon success of suit—Gambling in litigation—Public policy—Purchase from limited owner—Onus on purchaser, extent of—Ratification—Contract Act (XX of 1872), S. 196—Sale without legal necessity—Recovery by reversioner—Mesne profits, claim for*

In India an agreement cannot be avoided on the ground of champerty (a).

The agreement in this case provided that out of the purchase money which was fixed at Rs. 52,600, Rs. 600 only was to be paid down, and the balance when the property should be recovered.

Held, that the agreement was generally of a champertous character but was not void on that account, nor was it opposed to public policy and void as such by reason of the stipulation relating to the payment of consideration.

An assignment cannot be questioned as unfair and unconscionable by a person who was not a party to the assignment.

One who claims title under a conveyance from a Hindu woman with the usual limited interest which a Hindu woman takes, and who seeks to enforce that title against reversioners, is always subject to the burden of proving, not only the genuineness of his conveyance, but the full comprehension by the limited owner of the nature of the alienation she was making and also that alienation was justified by necessity, or at least that the alienor did all that was reasonable to satisfy himself of the existence of such necessity. And this burden lies the more heavily on one who comes into Court with the case that he did not take from a limited owner, but from one whose title he alleges to have been adverse to that owner.

Ratification in the proper sense of the term, as used with reference to the Law of Agency, is applicable only to acts done on behalf of the ratifier; and this rule is recognised in S. 196 of the Indian Contract Act.

Where the defendant held possession of properties under deeds of sale from a limited owner, which were found to have been executed without legal necessity, the plaintiff's claim for mesne profits was allowed. **Raja Rai Bhagwan**

Hindu Law—(Continued).**—3.—(Alienation)—(Continued).**

Dayal Singh v. Debi Dayal Sahu, 12 C.W.N. 393 (P.C.).

LORD ROBERTSON, LORD COLLINS AND SIR ARTHUR WILSON.

References—(a) 4 I.A. 23=2 C. 233; 20 I.A. 112; 9 C.W.N. 477=32 I.A. 113=27 A. 271, F.

(19) *Alienation by Hindu widow—Consent of female reversioner, if passes absolute title—Propriety of transaction—Presumption of law.*

An alienation of her husband's estate by a Hindu widow without legal necessity, but with the consent of the next reversioners, who, if they had succeeded to the estate would themselves have been entitled to the limited estate of a Hindu widow, does not pass an absolute estate to the transferee.

No presumption of the propriety of the transaction arises from such consent. **Bepin Behari Kundu v. Durga Churn Bandopadhyaya**, 12 C.W.N. 914—8 C.L.J. 120.

MACLEAN C.J., AND DORA J.

(20) Conditions under which Hindu co-parcener can make valid alienations of whole property. See **HINDU LAW (JOINT FAMILY)**, No. 2/3, 10 Bom. L.R. 175.

(21)—See **HINDU LAW (REVERSIONERS)**

(22)—See **HINDU LAW (WIDOW)**

(23)—See **HINDU LAW (WILLS)**

(24) Sons' interest in a tenant's holding of the father. Sons not co-tenants—Relinquishment by father without sons' consent, validity of. See **RELINQUISHMENT**, No. 1, 11 O.C. 292.

(25) Brahmmins of Gopalpur in the Amritsar District—Son's right to question the validity of an alienation by father. See **CUSTOMS (PUNJAB)**, **ALIENATION**, No. 3, 59 P.R. 1908.

(26)—by Hindu widow for consideration binding on reversion—Reversioner seeking to set aside—Offer to recompense alienor. See **HINDU LAW (WIDOW)**, No. 6, 18 M.L.J. 11.

(27) Alienation of husband's property by Hindu widow—Daughter's estate intervening between widow and next presumptive reversioner—Whether reversioners prevented from suing for declaration of their rights. See **HINDU LAW (REVERSIONERS)**, No. 5, A.W.N. (1908), 207.

Hindu Law—(Continued).**—3.—(Alienation)—(Concluded).**

(28) Suit by son to contest alienation of ancestral property by his father—*Omnis probandi* of proving ancestral property on son. See CUSTOMS (PUNJAB)—ALIENATION, No. 18, 128 P.W.R. 1908 (P.C.).

(29) Alienation by widow—Right of residence in family house. See HINDI LAW (WIDOW), No. 17, 4 M.L.T. 485

—4.—(Conversion).

(1) Apostacy of wife—Rights of Hindu husband—Decree for custody of wife or restitution of conjugal rights. See HINDI LAW (MARRIAGE), No. 2, 49 P.W.R. 1907 = 83 P.L.R. 1908

—5.—(Debts).

(1) *Joint Hindu family—Liability of sons for father's debts—Defence that debts were incurred for immoral purposes—Burden of proof.*

According to the Hindu Law of the Mitakshara school, it is not necessary, in order to establish a son's liability for his father's debt, that it should be shown that the debt was contracted for the benefit of the family. It is sufficient in order to establish the liability of sons to pay a personal debt of their father, if the debt be proved, and the sons cannot show that it was contracted for immoral purposes or was such a debt as does not fall within the pious duty of the sons to discharge (a).

Where in such a case as the above, the sons set up the defence that the debt was incurred for immoral purposes, the burden of proof is on them and not on the creditor (b).

And merely general evidence of profligacy on the part of the father is not sufficient (c). **Babu Singh v. Bibari Lal**, A.W.N. (1908), 61 = 5 A.L.J. 175 = 90 A. 156

BANKAJI AND RICHARDS, JJ.

References —(a) 28 A. 508 D., 21 A. 238 and 27 A. 16, F.; 13 C. 21, R. (b) 24 A. 459, F., 9 A. 493, Diss. (c) 14 B. 320 R.

(2) *Sons brought on record in pending suit as father's legal representatives—Form of decree—Representative capacity.*

Where, in a suit, pending against a deceased Hindu, his sons have been brought on the record in their character of personal representatives of the deceased, the decree should be against them as personal representatives, the

Hindu Law—(Continued).**—5.—(Debts)—(Continued).**

amount of the decree to be realised from the estate of the deceased in their hands (a). **Narayanawami Naick v. Sesahama Raju**, 18 M.L.J. 36 = 3 M.L.T. 240.

WHITE, C.J., AND SANKARAN NATH, J.

Reference —(a) 27 M. 243 (248), approved.

(3) *Son, right of, to challenge a ready money debt contracted by the father—Antecedent debt, meaning of—Grounds for challenging a debt contracted by a Hindu father.*

Where family property is mortgaged by a Hindu father to secure repayment of an advance made at the time of the mortgage, his son cannot challenge the mortgage on the ground that there was not an antecedent debt. In order to challenge such a transaction, he must show that either the debt was not contracted at all or is no longer in existence or is tainted with immorality (a).

Antecedent debt is a debt existing prior to and independently of a sale or mortgage of joint Hindu family property (b); and debt, incurred at the time of sale or mortgage, is not an antecedent debt, within the meaning of those words as used by the Privy Council (c) **Jangi Singh v. Chaudhri Ganga Singh**, 10 O.C. 360

SANDERS AND GRIFFIN, J. CS

References —(a) 21 A. 459, F. (b) 29 M. 200, R. (c) 5 C. 148 (P.C.) R., 28 A. 328, A.W.N. (O1), 57, R.

(4) *Father, as manager of family, entering into contract, for its benefit—Failure to fulfil obligation—Breach of civil duty—Criminal misappropriation—Liability of family property*

A Hindu father, as manager of the undivided Hindu family consisting of himself and the second defendant, entered into a *Kuri* transaction, and received a certain sum of money in consideration of his undertaking to manage the fund, to make collections from the other members, and to dispose of the collections in accordance with the contract entered into by him with the other members. The *Kuri* transaction was entered into for the benefit of the family, and the sum received for the family benefit

The father made the collections, but failed to make the payments he was bound to do

Hindu Law—(Continued).**—5—(Debts)—(Continued).**

Held, that the failure to make the payments did not amount to misappropriation (a) but only to a breach of a civil duty that, the obligation of the father and the liability of the family property to pay the plaintiff having arisen by virtue of the contract entered into by him as manager of the family and for its benefit coupled with the subsequent receipt of the collections, his failure to fulfil it could not free the family property from its liability for the debt. **Kanemar Venkappayya v. Krishna-charya**, 17 M.L.J. 613=3 M.L.T. 353=2 M.L.T. 529=31 M. 161.

WHITE, C.J., AND BENSON J.

References —(a) 27 M. 71, D and 16 M. 90, R (*distinguished* in 27 M. 71)

(5) *Liability of sons to pay father's debts—Tort committed by father—Decree for damages against the father—Son cannot be held liable under the decree, when the estate he inherited from his father has derived no benefit by the act.*

Under Hindu Law, the son is not to be held liable for debts which the father ought not, as a decent and respectable man, to have incurred. He is answerable for the debts legitimately incurred by his father, not for those attributable to his failings, follies or caprices.

Hence, where the father's act in obstructing the passage of water to another's lands, though not illegal in the usual sense of the term, but, is wrongful, and that other obtains a decree against the father for the damage done, the son cannot be held answerable for the liability so incurred, when the estate that has come to his hands has derived no benefit from the act. **Durbar Khachar Odha Ala v. Khachar Harsur Oghad**, 10 Bom. L.R. 297=32 B. 348.

CHANDAVARKAR AND KNIGHT, JJ.

(6) *Husband's debts—Satisfied by a wife in his life-time—Voluntary payment—Transfer of husband's property after his death—Equity—Liability to pay the consideration money—Joint family, nature of—*

The existence of debts due by the ancestor at the time of his death is a condition precedent to the liability of the heir to pay them. When a husband's debts were paid by a wife in the life-time of the husband, the payments were voluntary payments and the husband's property

Hindu Law—(Continued).**—5—(Debts)—(Continued)**

could not be made liable for those debts after his death. A transfer of property for payment of those debts could not be deemed to be a transfer made for payment of his debts.

During the life-time of N, his wife M, paid his debts. After his death, when she inherited his property, she transferred certain property to satisfy those debts. Plaintiffs, the daughter's sons of N sued to set aside that sale. *Held*, that the plaintiffs were not bound by the sale as the payments by M were only voluntary, and the property could not be made liable for the debts but the plaintiffs were in equity liable to pay the whole consideration money which the transferee had paid.

Nature and incidents of a joint Hindu family governed by the *Mitakshara* considered. **Himmat Bahadur v. Bhawani Kunwar**, 5 A. J. J. 339= A.W.N. (1908), 143 A. 352.

STANLEY, C.J. AND KARAMAT HUSAIN, J.

(7) *Mitakshara—Father's liability as surety, if and how enforceable against son—Liability, if personal or extends to property—Antecedent debt—Limitation.*

Where a *Mitakshara* father stood surety in respect of a mortgage-debt stipulating that, in case the mortgage was prevented from holding possession of the mortgaged property or from collecting the rents, the debt would be recoverable with damages from certain specified plots of the family property of the surety, and more than six years after the mortgage was ousted from the mortgaged property, the mortgagee sued the son of the surety to enforce his rights under the surety bond.

Held that there was no "antecedent" or actual debt for which the surety was liable on the date of the bond, and the liability which subsequently arose cannot be regarded as a debt which, apart from any question of legal necessity or benefit of the family, was binding on the family property in the hands of his son.

The son was, if at all, personally liable to discharge the debt, and the personal remedy against the son being time-barred, there was no means of following ancestral property in his hands.

Quære—Whether a *Mitakshara* son is under a pious obligation to discharge a debt incurred by his father standing surety. **Hira Lal Mar**

Hindu Law—(Continued).**—5.—(Debts)—(Continued).**

Wari v. Chandrabali Haldarin, 13 C.W.N. 9
=4 M.L.T. 429.

CASPERSE AND SHARFUDDIN, JJ

References —26 C. 611; 23 B. 454 and 11 M. 373, D.

(8) Joint Hindu family—Decree against father, the son not being party—Suit against son, on death of father—Cause of action

The death of a father, a member of a joint Hindu family, does not give his creditor a fresh cause of action against his son for the recovery of a judgment-debt binding upon the son.
Itraj Kunwar v. Pirthipat Tewari, 11 O.C. 334.

CHAMBER, J.C.

References —23 M. 292, and 21 A. 301, B. 6 O.C. 271, D

(9) Hindu Law—Father's debts—Inability of sons to pay—Father's power to alienate ancestral property—Attachment of son's share in the property—Prohibition of alienation under S. 276 of the Civil Procedure Code—Father's right to deal with the share.

Under Hindu Law a father has the right to sell or mortgage ancestral property, including the interests therein of his sons, in satisfaction of his antecedent debts, provided those debts were not contracted for immoral or illegal purposes. This right to dispose of the ancestral property so as to include and affect the shares of the sons arises according to Hindu Law in virtue of the pious obligation of the sons to pay the debts of the father, which were not illegal or immoral. In other words, where the father alienates the property, he exercises the power of alienation which the sons would have exercised in discharge of their pious duty which they owed to him; he is virtually alienating the property for them and on their behalf in discharge of their duty in accordance with the power given to him by Hindu Law

Hence, where the right, title and interest of a Hindu son in joint ancestral property has been attached in execution of a decree against him, and its private alienation by him prohibited by an order of the Court under S. 276 of the Code of Civil Procedure, 1882, his father is deprived of the power of alienation of that interest in

Hindu Law—(Continued).**—5.—(Debts)—(Concluded).**

satisfaction of his own debts. **Subraya Yithal Naik v. Nagapa Subaya Shanbhog**, 10 Bom. L.R. 1206

CHANDAVARKAR AND HEATON, JJ.

(10) Debt contracted for marriage of coparceners, nature of. See HINDU LAW (JOINT FAMILY), No. 1, 9 Bom. L.R. 1866.

—6.—(Exclusion from Inheritance).

(1) See HINDU LAW (INHERITANCE), No. 2, 10 Bom. L.R. 149

(2) See HINDU LAW (SUCCESSION), No. 6, 10 Bom. L.R. 559.

—7.—(Gift).

(1) Actual and exclusive possession, whether necessary to validate a gift

According to Hindu Law, the giving of actual and exclusive possession is not necessary to the completion of a gift. When a person executed and registered a deed of gift in favour of his mistress and gave her the power to receive the documents after registration *Held*, that the donor had done all that was possible to complete the gift and that, as the woman was living in the house at the time with the donor, she was given possession by the very act of execution of the deed **Ram Charan Das v. Bhagwati**, 52 P.R. 1908 = 103 P.W.R. 1908.

CHATTERJI AND JOHNSTONE, JJ.

(2) Limitation by Hindu testator or settlor of his estate followed by endowment of property to pious purposes, validity of. See HINDU LAW (RELIGIOUS ENDOWMENTS), No. 1, 5 A.L.J. 256

(3) See HINDU LAW (ALIENATION)

—8. (Guardianship).

(1) Step-mother whether can be guardian of her step-sons—Validity of alienation made by step-mothers during guardianship—Remarriage of mother, effect of, on her status of guardianship—finding of fact based on a misapprehension of evidence, whether binding on Court to Second Appeal.

A Hindu step-mother may be recognised as her step-son's guardian, especially where she has been their *de facto* guardian ever since their father's death (a) and, as manager of her step-son's estate she has, in case of necessity or for the benefit of the minor, power to alienate his property (b).

Hindu Law—(Continued).**—8.—(Guardianship)—(Concluded).**

The remarriage of a Hindu mother does not of itself involve loss of her right to be the guardian of her sons (c).

The finding on an issue of fact by a Lower Appellate Court, which is based on a misconception of what the evidence is, cannot be accepted in second appeal as a legal finding (b) **Jago v. Oodal**, 4 N.L.R. 20.

Drake-Brockman, O J.C.

References :—(a) 7 W.R. 421; 10 M.L.A. 454. R. (b) 6 M.L.A. 412, 26 C. 820, R. (c) 16 C.P.L.R. 99, R. (d) 20 B. 753, R.

(2) See HINDU LAW (JOINT FAMILY), No. 6, 10 BOM. L.R. 279.

—9.—(Impartible Estate).

(1) *Previous suit compromised—Effect of compromise—Interpretation.*

The widow of the last holder of an impartible estate was in possession of that estate under a will. Her husband's nephew brought a suit to contest the will and to recover possession of the impartible estate. The suit was compromised the widow being left in possession during her life-time of the estate as *gaddinashin*, but without the power to transfer or charge the estate in any way, an annuity of Rs. 12,000 per annum being settled upon the nephew, and it being declared that after the death of the widow, the nephew, or any representative (*harm moham*) of his, who may be alive at the time, shall be the absolute owner (*malik mustaqil*) of the estate and shall occupy the *gaddi*.

Held, upon the construction of the compromise, that the character of the estate as it had been handed down from father to son for generations was not changed, that the nephew took an absolute vested interest in the property the enjoyment of it being postponed during the life of the widow and that upon the death of the nephew, the estate devolved according to the rules of primogeniture governing impartible estates and did not pass to the widow of the nephew as an estate governed by the ordinary rules of Hindu Law. **Harpal Singh v. Lekhraj**, 5 A.L.J. 425 = A.W.N. (1908), 165 = 40 A. 106.

Stanley, C.J. and Banerji, J.

—10.—(Inheritance).

(1) *Whether murderer entitled to succeed to the estate of the person whom he murdered—Proof of murder—Acquittal by a Criminal*

Hindu Law—(Continued).**—10.—(Inheritance)—(Continued).**

nal Court, whether conclusive in Civil Suit—Unchastity in mother, whether disqualifies her from inheriting—Ragunanthana, whether authority in Southern India.

If a person is a party to the murder of a certain person, he cannot succeed to the estate of the murdered person.

Thus, a mother, if she be a party to the murder of her son, will be excluded from the inheritance, which will pass to the next reversioner.

The fact that such a mother was acquitted by a Criminal Court of the charge of murder is no answer to a civil suit by the next reversioner claiming to succeed in preference to the mother. But, in order to entitle the reversioner to succeed, it is necessary that he should establish the mother's complicity in the fatal act by clear and satisfactory evidence, and it is not enough to raise a case of suspicion against her.

A mother is not debarred from succeeding to her son on the ground of unchastity.

Unchastity is no ground of exclusion in any female heir except a widow.

Illicit intercourse with a person not belonging to an equal or superior caste, though it may produce degradation of the woman, does not affect the proprietary rights of the degraded person since the passing of Act XXI of 1850; nor can it be contended that aggravated unchastity has that effect.

Ragunanthana is no authority in Southern India. **Yedammal v. Yedanayaga Mudaliar**, 18 M.L.J. 70 = 31 M. 100 = 2 M.L.T. 533.

Wallis and Sankaran Nair, JJ.

References —5 M. 149, 4 B. 104, 23 M. 171; 4 C. 550, 26 M. 509, 1 A. 46, 42 C. 347, 32 C. 871, 30 C. 521, 3 M. 269 (269), 5 C. 776 (787), 5 M. 149, R.

(2) *Exclusion from inheritance—Disqualification of husband as murderer—Wife not affected by disqualification—Construction of laws*

The wife or widow of a disqualified Hindu does not become incapable of inheriting property merely by reason of her husband's disqualification, whether she claims as heir to a deceased person through her husband or otherwise, if she

Hindu Law—(Continued).**—10.—(Inheritance)—(Continued).**

is herself free from any of the defects which exclude a person from inheritance under the Hindu Law.

It is a canon of interpretation in Hindu Law that a special-text forming an exception to a general text should be construed strictly and applied only to the cases falling clearly within it. **Gangu v. Chandrabhagabai**, 10 Bom L R 149=32 B. 275

CHANDAVARKAR AND KNIGHT, JJ

- (3) *Mitakshara as interpreted in Bombay lex loci of Berar—Brahmins—Inexpiable or unexpiated unchastity by wife—Husband abandoning her—Effect on marriage relationship between such husband and wife and on their reciprocal rights of inheritance—Whether husband can inherit property acquired by such abandoned wife by unchastity—Whether such woman's sister's daughter or her husband's brother's son entitled to inherit property thus acquired by her.*

The Mitakshara as interpreted in the Bombay Presidency is the *lex loci* in Berar (a)

Where a Brahmin husband, in obedience to Hindu Law, totally and finally abandons his wife on the ground of unchastity—unexpiated or unexpiated, so as to destroy all her present and future claims on him and his inheritance the relationship of marriage is dissolved (b), so far as it sustains the civil rights and obligations of husband and wife *inter se*. The husband's right to inherit the property of the wife ceases simultaneously with the destruction of the wife's right to inherit the property of her husband (c).

Supposing that, notwithstanding the woman's unchastity and abandonment by her husband, her civil contract of marriage with that husband remained as undissolved as the sacramental and moral bond between them the husband, and a *fortiori* his *sapinaas*, cannot come in the list of heirs to the acquisitions of a fallen wife by and during her degradation, and after her excommunication.

Lastly, even if the husband and his *sapindas* could be supposed to be heirs to such an estate, then, having regard to the principle of consanguinity (d), as the predominant essential of heirship under the Mitakshara, to the position given to female heirs by the school of law which prevails in Berar, to the systematic preference

Hindu Law—(Continued).**—10.—(Inheritance)—(Continued)**

given by all schools of Hindu Law to females over males in the matter of succession to woman's estate and to the history of the estate in dispute, the sister's daughter of the woman is a preferential heir to her deceased husband's brother's son. **Ramprasad v. Mt Subu Bai**, 4 N.L.R. 31.

STANFON, A J.C

References—(a) S.A. No 136 of 1906 of the J.C's Court, Central Provinces, and 2 Bom Law Journal, 135, P. (b) 2 N.W.P 400, 4 M. 243, 9 M. 466, 23 M 171, 25 C 254; 29 A. 4; 6 C L J 372; 12 M. 277, DICK, 13 M 133, 21 C. 697, R. (c) 8 M. 169, R. (d) 17 B. 758, 6 C. 119; 2 B. 338, 429, 5 B 110, 121, 13 M 10, 14 M 149, 17 M. 182, 22 A 338, 12 B. 505, 1 A 46, 4 B. 204, 5 M 149; 4 C 550, 22 C. 347, 32 C. 871 R.

- (4) *Dayabhaga school—Succession—Uncle's estate—Joint nephew preferential heir to nephew separated by exclusion—Spiritual benefit, doctrine of, not the only principle of succession Mitakshara, application of, in absence of texts of Dayabhaga—Quasi contract and affection, principle of.*

Spiritual benefit is not always the guiding principle of inheritance under the Bengal School of Hindu Law.

In cases not contemplated by Junitvahana or his followers, the law should be developed on rational lines consistently with principles followed in similar cases, and the decisions of the Courts should not be based on a blind adherence to the principle of spiritual benefit, when such adherence would lead to a violation of other recognised principles consistent with natural justice.

In all cases of absence of texts or precedents under the Dayabhaga Law, recourse should be had to the theory of propinquity and natural love and affection as adopted by Vignaneswara and the commentators of the more ancient and orthodox schools of Hindu Law (a).

On the death of a Dayabhaga Hindu, a nephew who was living in joint estate and mess with him excludes another nephew who was separate, when the separation was due to his father having been excluded from inheritance for cause not expressly mentioned in the text books. The position of the latter is similar to that of the separated co-parcener who had not re-united (b).

Hindu Law—(Continued).**—10.—(Inheritance)—(Continued).**

and consideration which applies in the one case should govern the other. **Akhoy Chandra Bhattacharya v. Hari Das Gosswami**, 12 C.W.N. 511 = 35 C. 721.

MITRA, J.

References :—(a) W.N. (1900), 743, R. (b) 7 C.W.N. 642 = 30 C. 725 = 30 I.A. 190, R.

- (5) '*Matah*'—*Shebaitship, inheritance to—Lunatic, right of inheritance of—Dayabhaga, authority of—Dayabhaga, Chap. IV, Sec. 3, V. 31, 32, 33, spurious—Rival wife's son and daughter's son—Stridhan, Ayautuk.* •

Where the term '*Matah*' is used in a will, its precise meaning is to be determined by the context and with reference to the other clauses of the document.

In the absence of any directions to the contrary in the will, the right of inheritance to the *shebaitship* follows the same line as the right of inheritance to immoveable property.

In Bengal, insanity at the time when the inheritance falls in is sufficient for exclusion from the succession, even though the lunacy may not have been congenital, and where the succession to an office is in question, the duties attached to which require that the holder shall be in full possession of his senses, lunacy is undoubtedly sufficient to disqualify a person from succeeding.

The text of the *Dayabhaga* by Jinit Vahana cannot be regarded as in itself an authority absolutely binding, without any regard to the fact whether the doctrine propounded in the text has been accepted as a true exposition of the law and has been sanctioned by usage, and without any consideration of the question whether a verse relied upon bears on its face the evidence of being spurious and an interpolation (a)

Verses 32 and 33 and the words "of the rival wife" in verse 31 in sec. III of Chap IV of the *Dayabhaga* are interpolations and are spurious.

The son of a rival wife is not a preferential heir to the daughter's son in the line of succession of the *ayautuk stridhan* property of a Hindu female.

Hindu Law—(Continued).**—10 —(Inheritance)—(Continued).**

The destruction of an image does not destroy the endowment **Purna Chandra Bysack v. Gopal Lal Sett**, 8 C.L.J. 369.

BRETT AND MOOKERJEE, JJ

References :—(a) 10 W.R. (P.C.), 17, 21, 12 Moo I.A. 397, F.

- (6) *Partition deed by Hindu of his self-acquired property, as if it was ancestral property belonging to a joint Mitakshara family consisting of himself, his daughter and his illegitimate sons—Death of daughter childless after her father's death—Right of her husband or her father's heirs to succeed to the property.*

One S, shortly before his death, executed, on behalf of himself and his minor daughter P, a registered document, whereby he treated his self-acquired property, as if it was ancestral property belonging to the joint Mitakshara family consisting of himself, his seven illegitimate sons and his daughter P, and partitioned the property, retaining for himself and his daughter, as their share in severalty, the sum of Rs. 29,000 : and the seven sons, who took the rest of the property, agreed that he might draw and receive and dispose of the Rs. 29,000 as he thought fit.

The daughter died childless after her father's death, leaving the plaintiff-appellant, her husband, who brought this suit, claiming the Rs. 29,000 as her heir.

Held that there was nothing in the document to show that her father purported to make any gift to her, that he purported to partition the property, as if it was joint family property, between his seven sons on the one hand and himself and daughter on the other hand, and that he did not purport to give to his daughter in such partition any absolute estate in the property in question, either as to an undivided half share with himself or by way of a joint tenancy, with the right to take the whole absolutely upon survivorship.

Held, therefore, that she took by inheritance from her father, that, for the purposes of this suit, it mattered not whether the property inherited by her was her father's self-acquired property, or whether it was joint family property ; and that, in either case, she merely took a daughter's estate and that her father's heirs,

Hindu Law—(Continued).**—10.—(Inheritance).—(Concluded).**

and not her husband, were entitled to succeed. **J. Dorasawmi Mudaliar v. P. Govindasawmy Pillay**, 14 Bur. L.R. 286.

IRWIN, C.J., AND ORMOND, J.

(7) Succession to estate left by adopted son—Punjab Customary Law, adoption under—Kritrima form of adoption. See HINDU LAW (ADOPTION), No. 2, 53 P.W.R. 1908.

(8) Sarsut Brahmins of Gopalpura village, Amritsar District, are governed by, not by custom—Exclusion of daughters by mere collaterals. See CIV. PRO. CODE, No. 9, 95 P L.R. 1908.

(9) Illegitimate daughter of Shudra inferior to son of divided brother. See HINDU LAW (SUCCESSION), No. 7, 10 Bom. L.R. 736.

(10) Punjab Pre-emption Act (II of 1905), S. 12 (a)—Pre-emption based on relationship—Reversioner of a female included within the meaning of the section. See ACT II of 1905 (PUNJAB PRE-EMPTION), No. 8, 131 P W R. 1908.

(11) See HINDU LAW (SUCCESSION).

(12) Hindu suffering from incurable disease, inability of, to inherit—disease contracted *after* succession to estate will not divest such estate. See HINDU LAW (SUCCESSION), No. 1, A.W.N. (1908), 47.

—11.—(Joint family).

(1)—*Mitakshara—Samskara—Marriage of a co-parcener—family purpose.*

According to Hindu Law, a debt contracted for the marriage of a co-parcener in a joint Hindu family is binding on the other co-parceners as a debt contracted for a family purpose and therefore for the benefit of the family (a).

Under the Mitakshara as well as the Mayukha, the word "Samskara" ordinarily includes marriage. **Sundrabai Javji Dagdu v Shivnarayan Ridkarana**, 9 Bom. L.R. 1366=3 M.L.T. 44=32 B. 81.

CHANDAVARKAR AND KNIGHT, JJ

Reference.—(a) 27 M. 206, Diss.

(2/3) *Property acquired by joint exertions of father and sons living jointly—Character of the property—Nucleus of property—Joint property—Self-acquired property.*

Where a father and his sons acquire their property by their joint labour, and are, besides, joint in food and worship they must be regarded

Hindu Law—(Continued).**—11.—(Joint family).—(Continued).**

as having constituted a joint Hindu family (a), even though there may have been no nucleus of property which has come down to the father from his father or grandfather or great grandfather. For the formation of a co-parcenary in Hindu Law, such a nucleus is not absolutely necessary, provided the persons constituting it stand in the relation of father and son or other relation requisite for a co-parcenary system and those persons, by living, messing and worshipping together, and throwing all the property acquired jointly into one common stock, manifest their intention to deal with one another and with outsiders as members of a co-parcenary system under the Hindu Law.

It is open to a co-parcener to alienate the whole property with the consent of other co-parceners, but he cannot alienate it so as to prejudice the rights of other members of the family.

Where certain property has acquired the character of joint property under Hindu Law, it has imposed on it by that law, as a consequence of that character, certain obligations which cannot be got rid of, by the co-parceners to the prejudice of the parties in whose favour those obligations are created by the law, by a mere agreement to treat it as the self-acquired property of one of those co-parceners. **Laldas Narandas v. Motibai**, 10 Bom. L.R. 175.

CHANDAVARKAR AND KNIGHT, JJ

Reference.—(a) 10 B. 528, R.

(4) *Joint property—Joint family property—Joint ancestral family property—Distinctions between—Nucleus, how far a necessary ingredient.*

The three notions, (1) joint property, (2) joint family property and (3) joint ancestral family property are distinguishable. In all three things there is a common subject, property, but it is qualified in three different ways. The joint property, of the English Law, is property held by any two or more persons jointly, and its characteristic is survivorship. Analogies drawn from it to joint family property are false or likely to be false, for several reasons. The essential qualification of the second class, is not jointness only but a good deal more. Two complete strangers may be joint tenants, according to English Law; but, in no conceivable circumstances, could they constitute a joint Hindu family, or, in that capacity, hold property.

Hindu Law—(Continued).**—11.—(Joint family)—(Continued).**

In the third case, property is qualified in a two-fold manner; it must have been joint family property and it must be ancestral.

It is obvious that there must have been a nucleus of joint family property before ancestral joint family property can come into existence, because, the word ancestral connotes descent, and therefore, of course, pre-existence. But, because it is true that there can be no joint ancestral family property without a previous nucleus of joint family property, it is not true that there *cannot* be joint family property without a pre-existing nucleus, for that would be identifying joint family, with ancestral joint family, property.

Where there is ancestral joint family property, every member of the family acquires by birth an interest in it, which cannot be defeated by individual alienation or disposition of any kind. This is equally true of joint family property.

Where it is known or admitted that some, at least, of the property of a joint family has come down to them, the presumption is that the whole property is ancestral, and any member alleging that it is not will have to prove his self-acquisition.

Where property is admitted or proved to have been joint family property it is subject to exactly the same legal incidents in every respect as property which is admitted or proved to be ancestral joint family property. Further, this class of property, in India, differs radically, in origin and essential characteristics, from the joint family property of the English Law. The fundamental principle of the Hindu joint family is the tie of *Sapindaship*. Without it, it is impossible to form a joint Hindu family. With it, as long as a family is living together, it is almost impossible not to form a joint Hindu family, and it is of its very essence.

There is nothing, either in practice or theory, which excludes the possibility of members of the same family, starting a family fortune, holding it as members of a joint family, and, thereby, clothing it with all the legal qualities, and incidents of joint family property, chief among which is that every member born into the family, after the property has acquired that character, and before it has been divested of it by partition, obtains by birth an interest in it.

Hindu Law—(Continued).**—11.—(Joint family)—(Continued).**

Karsandas Dharamsey v. Gangabal, 10 Bom. L. R. 184=32 B 479

BEAMAN, J.

(5)—*Joint Hindu family, right of a member of, to represent other members of the family—Suit for recovery of the whole of the family property by one member.*

Held, that a member of a joint Hindu family could not insist upon representing the other members in a suit brought for the recovery of the property belonging to the whole family.
Babu Bhan Parcab Sahi v. Babu Sudisht Narain Singh, 11 O.C. 15

GRIFFIN AND CHAMBER, A J.C.

References:—23 M. 190 and 28 B. 11. H.

(6) *(Guardianship—Minor co-parceners—Guardianship centres when one of the members attains majority.*

Where a joint Hindu family consists of co-parceners who are all minors, the co-parceners forming one group, the Court has jurisdiction to appoint a guardian of the property for that group as a whole. But, when, subsequently, one of that group arrives at the age of majority the guardianship of the person so appointed by the Court must cease, and the Court is bound to hand over the joint family property to the co-parcener who has become an adult, although the other co-parceners are minors.
Ramchandra Yasudeo v. Krishnarao Yasudeo, 10 Bom. L. R. 279=32 B. 259.

CHANDAVARKAR AND KNIGHT, JJ.

References:—19 B. 309 (F.B.), *Appl.* 30 B. 155=7 Bom. L. R. 809, F.

(7/8) *Mitahshara—Separation—Partition—Re-union—Jointness without re-union—Tenants in common—Act of father binding on sons.*

The fact of living together and eating together on the same floor with food taken from the same cook-room or even the superintendence and control by the eldest and the most intelligent of the members cannot alone suffice to constitute either a joint or a re-united family as contemplated by Vignaneswara and his followers, if there be satisfactory proof of previous ascertainment of the shares of individual members.

The constitution of a joint Hindu family consisting of the father and his sons as much

Hindu Law—(Continued.)**—11.—(Joint family)—(Continued).**

that the father represents the sons without express written authority and is considered to be the accredited agent of the joint family. He may sue and be sued and may bind the family by the result of the litigation. In a family arrangement settling disputed rights and liabilities, his action, as representative of the family, is binding on the dependent members. (a) **Rai Gajindar Narain v. Rai Harihar Narain**, 12 C.W.N. 687.

MITRA AND CASPIERSZ, JJ.

References —(a) 2 W. and T. 839, applied. 1 A. 651; 8 I.A. 190 and 4 A. 120, relied on.

(9) *Manager can represent the family in suits brought on behalf of it—A co-parcener can also represent it if his action is consented to or ratified by his co-parceners—Certificate from Conciliator obtained by one entres for the benefit of all—Dekhan Agriculturists' Relief Act (A VII of 1879), S. 47.*

The rule of Hindu Law is that a joint family is represented in all transactions or concerns with the outside world by its *Karta* (manager) provided they are for the benefit or necessity of the family, and that any co-parcener, who does not occupy that position of manager, can represent and bind the family in such transaction or concerns, provided he was either previously authorised to represent it, or, in the absence of such authority, the other co-parceners subsequently by words or conduct ratified his acts.

Accordingly, the co-parceners of a joint Hindu family are entitled to maintain a suit to which the provisions of S. 47 of the Dekkhan Agriculturists' Relief Act apply, on the strength of a Conciliator's certificate obtained under S. 46 of the Act, by only one of those co-parceners, who was either the managing member of the family at the time the certificate was obtained or, who, though not manager, obtained it with the consent and on behalf of the joint family acting as its agent. **Yishnu Dhondi v. Babaji Bahiru**, 10 Bom. L.R. 505=32 B. 375.

CHANDAVARKAR AND KNIGHT, JJ.

(10/11) *Joint family firm—Liability of the firm for the act of a member pledging its credit—Negotiable instrument.*

Where the credit of a Hindu joint family firm is pledged by a negotiable instrument, good on its face and transferred in due course, the

Hindu Law—(Continued)**—11.—(Joint family)—(Continued).**

liability of the firm, whose signature is made by a person with authority to make that signature, is perfect, whether the transaction was or was not in the course of the firm's business.

The Bank of Bombay v. Raghunathji Tara Chand, 10 Bom. L.R. 668.

HEATON, J.

(12) *Manager of a joint Hindu family certifying payment of a decree in favour of himself and minor members—Security, power to demand, from manager—Civ. Pro. Code, S. 258.*

A person acting for himself and as guardian of the minor members of his family obtained a decree in satisfaction of which he obtained bonds in favour of himself alone and applied under S. 258, C.P.C., to have the adjournment certified. The lower Court directed him to file security on the ground that some of the decree-holders were minors.

Held that, as he was avowedly acting as managing member of a joint Hindu family, no security could be demanded from him. (a) **Manohar Lal v. Shree Singh**, 11 O.C. 216.

CHAMBER AND GREENE, J. CH.

Reference —(a) 12 C.W.N. 598, li.

(13) *Release by a co-parcener—Right of the co-parcener's son then in existence to recover his share in the family property—Right of an after-born son, in the property.*

M, one of the co-parceners in a joint Hindu family consisting of his brothers and father, gave a release of his share in the family property in consideration of his receiving a certain sum of money. M. had a son born to him before the date of the release. The son then sued the co-parcenary to recover by partition his share in the family property, and it was awarded to him. After the date of the release and of the partition decree, M. had a second son born to him. This second son then sued the first son to recover his moiety of the ancestral property that had fallen to the latter's share.—

Held, that the second son was not entitled to any share in the property. **Shivajirao Madhavrao v. Vasantrao Madhavrao**, 10 Bom. L.R. 778.

KNIGHT, J.

(14) *Bona fide compromise by father, binding on sons.*

Hindu Law—(Continued).**—11.—(Joint family)—(Continued).**

A *bona fide* compromise by a father of a disputed claim which is the subject of a pending suit is *prima facie* binding on his sons (a)

The rule in English Law that the Court will support family arrangements and not scan too closely the quantum of consideration is applicable to India (b). **T. R. Ganesh Rao v. T. Y. Tuljaram Rao**, 4 M.L.T. 288.

WALLIS, J.

References.—(a) 11 M.L.J. 70, 1 A. 161, 27 A. 203 (249), and 12 C.W.N. 687, R. (b) 1 W. and J. 233; 2 Ch. 294, 5 B.H.C. 128 (138) and 8 C. 138, R.

(15) Right of junior members—Management of endowed property vested in family—No right of management until partition

Where the office of a trustee of a temple is admittedly vested in his joint family, which has no beneficial interest therein, *held* —

that, so long as the members of the family remain undivided, the senior member alone is entitled, not only to manage the family properties, but also to exercise the right of management vested in the family on its behalf, he being the representative of the family in whom the administration of the trust is vested. Although it may be open to the members of the family to limit the authority of the managing member by a valid agreement with reference to their private properties, no junior member, until actual partition is made, is entitled to management of the trust in rotation, any more than he is entitled to such possession or management of any family property (a). **Thandavara Pillai v. Shunmugam Pillai**, 4 M.L.T. 486.

SANKARAN NAIK AND ABDUR RAHIM, JJ.

References.—(a) 1 M.H.C. 415, D., 19 A. 428 and 27 M. 193, R. and *Appr*

(16) Joint Hindu family—Presumption in favour of jointness—Entries in revenue papers of specified shares, effect of—Cesser of commensality as evidence of separation—Agreement to hold particular property in defined shares

Held, that, where a family is once proved or admitted to be joint, there is a strong presumption in favour of the continuance of such jointness which can be rebutted only by most cogent evidence (a).

Hindu Law—(Continued).**—11.—(Joint family)—(Continued).**

Held further, that the mere fact that the names of two brothers are entered in the revenue papers as owners of specified shares, does not constitute separation (b).

Held also, that cesser of commensality is cogent but not conclusive evidence of separation, the intention to separate must be proved (c). **Suraj Bakhsh v. Raghuraj Kunwar**, 11 O.C. 381.

EVANS AND GREENE, J. CS.

References.—(a) 12 W.R. 21, 19 W.R. 178, 22 W.R. 248, 22 C. 85, 18 A. 90, R., (b) 7 C. 369, 1 A. 437, 18 A. 176 and 27 L.A. 39 = 27 C. 515, R., and (c) 31 C. 262 and 30 C. 231, R.

(17) Trading partnership—Contract Act, Ss. 239 and 253—

A joint family business between a father and a son to the exclusion of the other members of the joint family, that is, of the other sons, can, under Hindu Law, have no existence whatever. In such a case the plaintiff should prove a partnership in the ordinary acceptance of the term (a).

The mere fact that a son enters his father's business, takes an active part in its management, signs hundis, and receipts and contracts, as if he were a partner, without any definite arrangement as to his remuneration, does not constitute the son as a partner of the father, but the son has merely agreed to serve in the business at such remuneration as his father might from time to time give him. **Sawanmal Pinanmal v. Pinanmal Danmal**, 2 Sind L.R. 13.

LUCAS, J.C., AND CROUCH, A.J.C.

References.—(a) 25 M. 149, F., 10 M.L.A. 490; 20 W.R. 197 and 27 M. 300, R.

(18) Members of joint Hindu family, rent due to—Suit by some co-owners, maintainability of—Addition of parties after period of limitation—Claim joint and indivisible—Effect. See CIV. PRO. CODE, No. 14, 7 C.L.J. 251.

(19) Contract made on behalf of a minor by persons of full age—Effect. See CIV. PRO. CODE, No. 319, 5 A.L.J. 14.

(20) Mitakshara joint family—Suit by managing member for family debt—Representation of minor co-parcener as next friend—Withdrawal of decretal money from Court—Next

Hindu Law—(Continued).**—11.—(Joint family)—(Concluded).**

friend, if bound to furnish security. See CIV. PRO. CODE, No. 258, 12 O.W.N. 598.

(21)—Mitakshara Law—Realisation of debt due to family—Unrealised debt left undivided at partition and subsequently realised by one member of the separated family—Relation between him and other members. See LIMITATION ACT, No. 60, 4 N.L.R. 84.

(22) Separate transactions among individual members—Entries of separate possession in village record—Not conclusive on question of separation. See APPEAL (SECOND APPEAL), No. 3, 11 O.C. 264.

(23) Suits instituted by a Hindu father—Effect of judgment against him—Right of son to file subsequent suit on same cause of action. See RFS JUDICATA, No. 10, 141 P.R. 1908

(24) Guardian of a minor belonging to a joint family—Transfer by mother purporting to act as guardian—Suit for possession by minor brought to recover property alienated without necessity—Limitation. See LIMITATION ACT, No. 55, 10 O.C. 367.

(25) Liability of sons for father's debts—Defence that debts were incurred for immoral purposes—Burden of proof. See HINDU LAW (DEBTS), No. 1, A.W.N. (1908), 61

(26)—See HINDU LAW (SELF-ACQUISITION).

—12.—(Maintenance)

(1) Wife leaving husband without sufficient cause and living apart from him during his lifetime—Death of husband—Right of such wife to maintenance against his estate—Conduct to be taken into consideration in fixing amount of maintenance.

A wife, who without sufficient cause leaves her husband and lives apart from him during his lifetime, does not forfeit her right of maintenance against his estate after his death. It is, however, open to the Court to have regard to the conduct of the widow in fixing the amount of her maintenance.

Widow's right to maintenance discussed by *Sankaran Nair, J Surampalli Bangaramma v. Surampalli Bramhazee*, 3 M L T. 266 = 18 M L J. 254 = 31 M. 83.

WALLIS AND SANKARAN NAIR, JJ.

References :—2 B. 597; 22 M. 307, 8 M. 246, R.

Hindu Law—(Continued).**—13 —(Marriage).**

(1) *Marriage of Rajaput with a Khatram woman, validity of—Burden of proof—Evidence of marriage—Treatment as wife—Bhadiar.*

Held, that under the Hindu Law, the marriage of a Rajaput with a Khatram woman is not invalid (a) and that the defendants on whom the onus lay (b) had failed to establish any custom to the contrary among the Bhadiar Rajaputs of the Kangara district

Where it was alleged that the marriage in dispute took place more than fifty years ago and it was shown that the woman was recognised as a married wife and her son as a legitimate issue by the alleged husband—

Held, that under the circumstances of the case the marriage must be held as proved *Haria v. Kanhayn*, 64 P L R 1908 = 72 P R 1908 = 47 P W R. 1908.

CHATTERJI AND JOHNSTONE, JJ.

References :—(a) 1 M.H.C. 478, 13 M L A 141, 14 M L A 346, 22 B. 277, 9 W R 552, 1 C. 13, 15 C 708, 18 C. 264, 73 P R 1897; 51 P.R. 1900, 48 P R 1890, *It*, 2 B 128 *D*, 29 P.R. 1882, 57 P R. 1893 *Vol F* (b) 13 M L A 141 and 8 A 113, *F*

(2) *Rights of Hindu husband—Apostacy of the wife—Decree for custody of wife or restitution of conjugal rights—Law of the defendant not applicable*

The apostacy of one of the parties does not in the case of Hindus *per se*, annul the marriage, and a Hindu husband is entitled to demand the custody of his wife and does not lose his rights over her, by the fact that she has renounced Hinduism and adopted Islam (a)

By Hindu law, a marriage is indissoluble (b).

In Hindu Law, as in all laws, the right of the husband is that his wife must live with him as wife, if he so wishes and if he has not lost this right, through some causes immanent in him or proceeding from him, calculated to render the enforcement of the right opposed to the principle of justice, equity and good conscience.

Such cases, where the plaintiff is a Hindu husband and the defendant is a Mahomedan convert and wife of the plaintiff, are not, properly speaking, cases of conflict of laws, so as to be governed by the law of the defendant. They must be governed by Hindu Law (c).

Hindu Law—(Continued).**—13.—(Marriage)—(Concluded).**

In every decree for custody of wife or restitution of conjugal rights, that the husband must refrain from cruelty is understood, and the Court will not insert in the decree any conditions which it could not enforce. **Jamna Devi v. Mul Raj**, 49 P.R. 1907=83 P.L.R. 1908=110 P.W.R. 1907 (Sup.).

JOHNSTONE AND RATTIGAN, JJ.

References :—(a) 4 B. 330, 2 N.W.P. 300; 10 M. 218; 18 C. 264; 32 C. 871, *R.*, 32 P.R. 1870 (Cr.) and 1 Norton's leading cases 12, *Diss.*, 85 P.R. 1906 and 9 M. 470, *Expl.* (b) 4 B. 330 and 18 C. 264, *R.* (c) 10 M. 218, *P.*, 10 B. 1, *Expl.*

(3) Custom—Marriage of a Rajput with a Mahajan woman.

Without laying down any general rule to the effect that a marriage between a Punjabi of the *Kshatriya* caste and a woman of a lower caste is always valid, it was held that, in this particular case, the marriage of a *Rajput* with a *Mahajan* woman in *chadar andam* form was a lawful one even supposing for the sake of argument that the woman was of *Vaisya* caste (a). **Khairu v. Fakir Chand**, 150 P.L.R. 1908=114 P.W.R. 1908.

CHEVIS AND KENSINGTON, JJ.

Reference —(a) Appeal No. 904 of 1904, in 64 P.L.R. 1908, *It.*

—14.—(Partition).

(1) Property alienated to third party by co-parcener—Method of partition.

It is within the power of the Court in effecting a partition, if, in its opinion, it can be done with due regard to the interests of the co-parceners, to allot to the share of one co-parcener the property which that co-parcener has alienated to the third party, and the Court will endeavour to do so (a). **Munusami Mudali v. Veerabadra Mudali**, 17 M.L.J. 617=3 M.L.T. 249.

WALLIS AND SANKARAN NAIR, JJ.

Reference :—(a) 25 M. 690 (715), *It.*

(2) Family arrangement - Consideration - Hindu Law—Agreement amongst co-parceners not to partition, to what extent binding

Persons jointly entitled to lands may, as amongst themselves, come to an agreement as to the manner in which they will mutually enjoy the property, and an agreement between

Hindu Law—(Continued).**—14.—(Partition)—(Continued).**

the members of a Hindu family not to come to partition may be binding on the immediate parties thereto (a).

A family arrangement may be such as the Court will uphold although there are no rights in dispute, and if sufficient motive for the arrangement is proved, the Court will not consider the *quantum* of the consideration too nicely (b).

Where in return for binding themselves not to sue for partition, the parties obtained a right to take advances from family funds in excess of what might be due to them at the time, and also obtained a right to pre-empt any share which the other members of the family might wish to sell.

Held, that the arrangement was for consideration. **Krishnendra Nath Sarkar v. Debendra Nath Sarkar**, 12 C.W.N. 793.

CASPERSEN AND COKE, JJ.

References —(a) 2 Hyd. 97, *P.*, 28 C. 769, *D.* (b) L.R. Ch. App. Vol. II, 294, *P.*

(3) Evidence of—Separation of one member of a joint Hindu family—Presumption.

Separation of one member of a joint Hindu family does not, in all cases, give rise to a presumption of a general division of the family (a). In partition proceedings, the fact that the parties have always lived apart is not of great importance, there being other circumstances to show that the property is kept joint. So such a fact is not, of itself, conclusive or even strong evidence in favour of partition. **Ranganatha Rao v. Narayanasami Naicker**, 31 M. 482.

MILLER AND ABDUR RAHIM, JJ.

Reference —(a) 30 C. 725 (P.C.), *It.*

(4) Widow's right to a share on partition by sons is defeated when a will expressly gives all the testator's properties to his sons—Right of Hindu mother to share in lieu of maintenance on partition of father's estate not affected by her inheriting share of same estate from one of her sons—Sons can take into account in estimating the share their mother is entitled to on partition any stridhan to her from their father. See HINDU LAW (WILLS), No. 9, 12 C.W.N. 1002.

(5) Presumption in favour of jointness—Entries in revenue papers of specified shares, effect of—Cesser of commensality as evidence o

Hindu Law—(Continued).**—14.—(Partition)—(Concluded).**

separation—Agreement to hold particular property in defined shares See HINDU LAW (JOINT FAMILY), No. 16, 11 O. C. 381.

(6) Satisfactory proof of previous ascertainment of shares of individual members—Living and eating together and superintendence of eldest, whether sufficient to constitute reunited or joint family. See HINDU LAW (JOINT FAMILY), No. 7/8, 12 C. W. N. 687.

(7) Partition deed by Hindu of his self-acquired property, as if it was ancestral property belonging to a joint Mitakshara family consisting of himself, his daughter and his illegitimate sons—Death of daughter childless after her father's death—Right of her husband or her father's heirs to succeed to the property See HINDU LAW (INHERITANCE), No. 6, 14 Bur. L. R. 286.

(8) —See HINDU LAW (JOINT FAMILY)

—15.—(Religious endowments).

(1) Powers of a Hindu testator to place limitations—Bequest followed by endowment.

Disputes having arisen about the management of a temple between D, the founder of the endowment and others, the matter was referred to arbitration. The arbitrators decided that D should be the manager of the temple but made no provision as to who was to succeed him. *Held*, that the founder of an endowment had an inherent right to appoint his successor in the absence of any express provision to that effect. D executed a document by which he reserved the life-estate in his property to himself and which was to devolve on his daughter after his death, and he directed that it was to be applied to the temple after her death. *Held*, there was no objection to the limitation by a Hindu testator or settlor of a life-estate followed by an endowment of property to religious or charitable purposes, such limitation not being contrary to the rule laid down by the Privy Council in the Tagore case. **Govind Pershad v. Gouti**, 5 A. L. J. 256 = A. W. N. (1908), 132 = 30 A. 288.

STANLEY, C. J., AND BURKITT, J.

(2) Right of Hindu interested in a public "tikana" to maintain a suit in respect of such "tikana"—Certificate of Advocate-General, if necessary See CIV. PRO. CODE, No. 290, 1 S. L. R. 155.

Hindu Law—(Continued).**—16.—(Reversioners).**

(1) Alienation by widow partly for binding purposes, whether void—Conditions for setting it aside—Declaratory relief, nature of—

Where her husband's property is sold by a Hindu widow for debts binding on the reversioner, the sale is not void, even though more money is obtained by the sale than is required for that purpose, and cannot be set aside except on payment of the amount binding on the reversioner with interest when the widow dies (a).

A declaratory decree is in any case a purely discretionary decree.

Where a plaintiff prayed for a decree declaring, not, the rights of a reversioner at the time of the death of a widow, but that a sale made by the widow, her mother, was not binding on her share after her mother's death, and did not offer to pay off the debt that was binding on the reversioner, *held*, that her suit was rightly dismissed. **Gouri v. Tirumaya Bhatta**, 18 M. L. J. 17.

BODDAM AND MUNRO, JJ.

References—(a) 9 W. R. 109, 11 B. L. R. 416 and 18 M. L. J. 11, R.

(2) Hindu Law—Widow taking absolute estate under a consent decree—Suit by reversioners to recover property after her death—Limitation—Limitation Act (XV of 1877), Arts 120 and 123

Under a consent decree, it was agreed upon between a widow and her husband's brothers who were his next reversionary heirs that she should take absolutely her husband's share in the family property. The family immoveable property was sold and a certain sum was given her as her husband's share. Eleven years after her death, the reversionary heirs brought a suit to recover the property from the hands of executors appointed under her will

Held, (1) that the reversionary heirs were estopped (a) from bringing a suit to recover the property after the arrangement which they had made with the widow. The ordinary restrictions would not apply to property which has passed to a widow not as heir, but by deed or other arrangement conferring on her absolute powers (b).

Hindu Law—(Continued).**—16.—(Reversioners)—(Continued)**

(2) That as the immoveable property was converted into money, and the money became moveable property in her hands and lost all impress of its origin, Art. 120 of the Limitation Act applied, and the suit was time-barred.

Art 123 of the Limitation Act is not meant to be applied to cases of reversioners suing to recover property which has been held for some intervening time by a widow, whether that property be moveable or immoveable. **Ganpatrao Moroji v Yamanrao Shamrao** 10 Bom.L.R. 210.

BEAMAN, J

References —(a) 25 I.A. 189 and 34 B. 165, R. (b) 2 I.A. 256, 2 I.A. 7, 11 B. 69, R., 7 B. 155 and 491, 17 B. 690, 6 Bom. L.R. 160, 16 B. 229, 10 B. 478, 9 M.I.A. 123, R.

(3) *Alienation by widow—Suit by reversioners for a declaration of the invalidity of an alienation by widow during lifetime of daughter—Starting point of limitation—Limitation Act (XV of 1877), Art 120.*

Five sons of the daughter of a last male owner sued in 1902, during the lifetime of the daughter, for a declaration of the invalidity of an alienation made by the widow of such last male owner in 1867. Plaintiffs were undivided brothers, the last of whom was born many years after alienation. The suit, however, was brought within three years of his attaining majority. *Held*, that the suit was barred under Art. 120 of Limitation Act, 1877, the cause of action having arisen in 1867, and the plaintiffs other than the fifth plaintiff having attained their majority more than six years before suit. As to the contention that the 5th plaintiff's right as reversioner was derived direct from the last full owner his right to sue, would not have arisen until after his birth and that, therefore, he might sue within three years of his attaining majority, it was held that as he was admittedly a member of a joint Hindu family entitled to succeed jointly with the other plaintiffs and that, as the first plaintiff could have brought the suit within six years of the accrual of cause of action, but allowed the suit to be barred, the whole suit was barred (a) The interest of the fifth plaintiff had been represented by the other plaintiffs who had allowed the suit to be barred. **Krishna**

Hindu Law—(Continued).**—16.—(Reversioners)—(Continued)**

Iyer v. Lakshmi Ammal, 3 M.L.T. 319 = 18 M.L.J. 275

BENSON AND MILLER, JJ

References —(a) 25 M. 678; 29 M. 390, *Appl*

(4) *Release by next reversioners in favour of widow—Suit by actual reversioners at death of widow—Estoppel.*

A whole body of next reversioners executed a release in favour of a Hindu widow releasing their rights to the estate of her deceased husband in consideration of her conveying to them immediately her interest in a portion of the property. The deed stated, that the widow might leave the estate released in her favour to anybody she liked. The widow subsequently alienated portions of the estate released in her favour and died. The next reversioners claiming through the reversioners who executed the release, then brought a suit for recovery of the portions of the estate alienated by the widow.

Held, per WHITE, C.J. —(1) the release could not be construed as extinguishing the whole of the widow's estate, and as the whole of the widow's estate was not extinguished, the surrender by the reversioners was not effective so as to validate the alienations made by the widow of her limited estate,

(2) The plaintiffs, however, having claimed through the reversioners, who had executed the release and thereby consented, *bona fide* and for good consideration, to the future alienations of the widow, were estopped from maintaining the present suit.

Per WALLIS, J. —(1) The renunciation evidenced by the deed in question having been a contrivance by the widow and the next reversioners to defeat remote reversioners, it had not the effect of validating alienations of the estate, subsequently made by the widow to third parties, without the express consent and even apparently, without the knowledge of the plaintiffs, on the second point, the plaintiffs were estopped from maintaining the suit by reason of the consent of their fathers for consideration to future alienations by the widow.

Per SANKARAN NAIR, J. —(1) The next reversioners having, for consideration, surrendered their interest in the reversion to the widow, what had passed thereunder to the widow was

Hindu Law—(Continued).**—16—(Reversioners)—(Continued).**

enjoyed by her not as a widow's estate but as absolute property which she had the power to dispose of at her pleasure.

On the second point:—The immediate reversioners having, for consideration, executed the deed in favour of the widow and the plaintiffs, the actual claimants having participated in that benefit, it did not lie in their mouths to impeach the subsequent alienations by the widow. They were consequently estopped from maintaining the suit. **Rangappa Naik v. Kamli Naik**, 3 M.L.T. 355 (F.B.)=81 M. 366=18 M.L.J. 309.

WHITE, C.J., WALLIS AND SANKARAN NAIR JJ.

References:—19 C. 296; 21 M. 128; 12 C.W. N. 74, F.; 8 M.I.A. 500; 12 C.W.N. 74; 29 M. 120; 24 A. 94; 13 M.L.J. 323; 22 C. 354, 22 A. 33; 28 M. 57, 10 C. 1102, 13 M.I.A. 209; 6 A. 116; 25 B. 129; 17 C. 896, 23 M. 486; 26 M. 635; 21 A. 80, 29 M. 396, R.

(5) Hindu widow—Alienation of husband's property by widow—Rights of reversioners to sue

The widow of a separated Hindu who had a daughter living gave a perpetual lease of a portion of her husband's property to two persons, strangers to the family, at a nominal rent of Rs. 2 a year. *Held*, that the fact that the daughter's estate might intervene between the widow and the next presumptive reversioner would not prevent the latter from suing for a declaration that the perpetual lease given by the widow could not be detrimental to his interests. **Hanuman Pandit v. Jota Kunwar**. A.W.N. (1903), 207.

KARAMAT HUSAIN, J.

References:—6 A. 431, F., 8 I.A. 14; 13 M. 195 and 32 C. 62, R.

(6) Widow, lease by—No legal necessity—Beneficial arrangement—Bargain not prejudicial to the reversioners—Legal necessity depending on facts of each case—Possession, suit for, by some of the reversioners, of their shares, maintainability of—Family Settlement, principle of, applicable to arrangement between parties interested in the property—Ratification—Indian Contract Act (IX of 1872), Ss. 196, 199.

Hindu Law—(Continued).**—16—(Reversioners)—(Continued).**

A suit by some of the reversioners to recover possession of their shares from the lessee of a Hindu widow after her death is maintainable.

Each case of legal necessity must be judged upon its own facts.

The reversioners must establish a very strong case to induce a Court of justice, equity and good conscience to set aside a beneficial arrangement by a Hindu widow which induced a sense of peace and security and one that has had a far-reaching consequence.

If a Hindu widow made a good bargain for herself, and if that bargain did not prejudice the position of the then reversioners, it should be given effect to (a).

If parties arrange to avoid the necessity for legal proceedings, their arrangement is supported by sufficient consideration.

Apart from legal necessity, a widow can validly alienate property that has devolved on her from her husband with the consent of the reversioners. The widow can make such an alienation by the entire surrender of her own interest and thereby accelerate the interest of the reversioners, or she can part with her direct interest in the estate and convert it into an annuity. Subject to the payment of the annuity, the transferee will acquire an absolute interest (b).

The principle of family settlements is applicable to an arrangement by which the persons interested in the property mutually consent that the property shall be managed in a particular and a convenient manner and if the arrangement does not seriously prejudice the parties to it or those who come after them, a Court of Equity will be slow to set it aside.

Ratification in the proper sense of the term, as used with reference to the law of agency, is applicable only to acts done on behalf of the ratifier. A woman with a limited interest could not by acts *ex post facto* charge upon the estate, which she represents, obligations not originally binding upon it. A Hindu widow cannot be said to give a lease on behalf of the reversioners. The acts performed by the reversioners after the death of the widow cannot amount to a ratification of the lease, as the widow is not the agent of the reversioners (c).

Hindu Law—(Continued).**—16—(Reversioners)—(Continued)**

Bejoy, Gopal Mukerji v. Girindra Nath Mukerji, 8 C.L.J. 458.

CASPERSZ AND COXE, JJ.

References—(a) 33 C. 842 *Appl.*; 18 B. 834, R.; (b) 22 C. 354 (361), R; 29 A. 487 (494), D; (c) 7 C.L.J. 335 = 35 C. 420, F.

(7) Son-in-law managing mother-in-law's property—Property ample to meet liabilities—Mortgage to son-in-law—Consideration paid out of estate—Colourable transaction—Binding nature of transactions on reversioners. See MORTGAGE (GENERAL), No. 4, 3 M.L.T. 285.

(8) Reversioner, right of, to set aside widow's sale-deed and to recover property from her purchasers, conditions for exercise of—whether widow holds property for benefit of. See HINDU LAW (WIDOW), No. 6, 18 M.L.J. 11.

(9) Suit by reversioner in widow's lifetime to set aside her alienation except for her life—Art. 125, Limitation Act, governs suit—Suit under Art. 125, barred—Remedy of reversioner See HINDU LAW (ALIENATION), No. 9, 12 C.W.N. 857.

(10) Adverse possession—Claim for possession of property of a Hindu, leaving widow and other heirs—Abandonment by widow—Starting point of limitation. See LIMITATION ACT, No. 112, 61 P.W.R. 1908.

(11) Reversionary heirs of deceased husband of Hindu widow not entitled during her lifetime to redeem mortgage made by husband—Whether such heirs are persons having an interest in mortgaged property within S. 91, Transfer of Property Act. See TRANSFER OF PROPERTY ACT, No. 64, A.W.N. (1908), 225.

(12) Transfer by Hindu reversioner of his reversionary interest expectant on death of widow—Validity. See TRANSFER OF PROPERTY ACT, No. 2, A.W.N. (1908), 284.

(13) Transfer by Hindu widow for legal necessity before re-marriage—Conditions under which the reversioners will be bound. See HINDU LAW (WIDOW), No. 18, 8 C.L.J. 542.

(14) Widow's estate—Family settlement to settle dispute to which widow party, if binds reversioners. See HINDU LAW (WIDOW), No. 18-a, 13 C.W.N. 147.

(15)—See HINDU LAW (ALIENATION).

(16)—See HINDU LAW (WIDOW)

Hindu Law—(Continued).**—16.—(Reversioners)—(Concluded).**

(17) Conveyance by a widow of her life estate to reversioner—Not invalid by reason of contemporaneous agreement between the widow and the reversioner. See HINDU LAW (WIDOW), No. 19, 31 M. 446.

—17.—(Schools of Law and Texts).

(1) Mitakshara Law, as interpreted in Bombay, *lex loci* of Berar. See HINDU LAW (INHERITANCE), No. 3, 4 N.L.R. 31.

(2) Construction—Text of Mitakshara ordaining an omission to be sinful Nature of obligation imposed. See HINDU LAW (SUCCESSION), No. 2, 9 Bom. L.R. 1187 = 32 B. 26.

(3) Authority of Nanda Pandita on matters of Hindu Law. See HINDU LAW (ADOPTION), No. 6, 10 Bom. L.R. 948.

(4)—, authority of—Dayabhaga—Dayabhaga, Ch. IV, S. 3, verses 31, 32 and 33 are spurious interpolations. See HINDU LAW (INHERITANCE), No. 5, 8 C.L.J. 369.

(5) Ragunanthana, whether authority in Southern India. See HINDU LAW (INHERITANCE), No. 1, 18 M.L.J. 70.

(6) Mitakshara—Vyavahara Mayukha's view as to sister's position in the line of heirs—Balambhatta and Nanda Pandita, relative values of commentaries by—Rules of interpretation. See HINDU LAW (SUCCESSION), No. 1, 10 Bom. L.R. 389

—18.—(Self-acquisition).**(1) Burden of proof—Self-acquisition—**

Where admittedly there was ancestral property belonging to the parties, there is, under the Hindu Law, a presumption in favour of the party alleging that the property is joint and the burden of proof as to the same being self-acquired lies on the party asserting it to be self-acquisition Where there is proof that the self-acquisition of the parties were thrown into the common stock and treated as joint family property, such property loses the character of separate property even if it had possessed that character before. **Yenkatasubbramania Yathiar v Subbramania Iyer**, 3 M.L.T. 314.

BENSON AND MUNRO, JJ

(2) Presumption.

Where a Hindu makes over his property to his grandson by a deed of gift, in which the property is described as his self-acquired pro-

Hindu Law—(Continued).**—18.—(Self-acquisition)—(Concluded).**

perty, and his son appends his attestation to the deed, held that the inference was clear that the property was a self-acquisition of the donor. **Kalianji Ranchhod v Bezanji Nassarwanji**, 10 Bom. L. R. 754=32 B. 512

BATCHELOR AND CHAURAL, JJ.

(3)—See HINDU LAW (JOINT FAMILY).**—19.—(Stridhan).**

(1) *Dayabhaga*—Succession to *putridatta ayautuka*—Son or married daughter, preferential heir—*Kanya*, meaning of.

Sons succeed in preference to married daughters to the *putridatta ayautuka stridhana* of their mother

* The word *kanya* in paragraph 16, S. 2, Ch. 4 of the *Dayabhaga* means "unmarried daughter" **Prosanno Kumar Bose v. Sarat Shosi Ghosh**, 12 C.W.N. 924=8 C.L.J. 200

BRETT, COXE AND MITRA, JJ

(2) Funeral expenses of mother are a charge upon son's estate—Mother's stridhan not liable. See HINDU LAW (SUCCESSION), No. 2, 9 Bom. L. R. 1187=32 B. 26.

(3) Stridhan of a maiden—Father's mother's sister entitled to succeed in preference to her maternal grandmother. See HINDU LAW (SUCCESSION), No. 5, 10 Bom. L. R. 522.

(4) Whether son of rival wife, a preferential heir to daughter's son to *Ayautuk stridhana*. See HINDU LAW (INHERITANCE), No. 5, 8 C.L.J. 369.

—20.—(Succession)

(1) Person excluded from succession by incurable disease.

Although a Hindu who is suffering from an incurable disease may be unable to inherit, if he succeeds to an estate before contracting such disease he will not thereby be divested of such estate. **Murli Singh v. Jai Singh**, A.W.N. (1908), 47=5 A.L.J. 115.

AIKMAN AND KARAMAT HUSAIN, JJ

(2) Mother succeeding to her son takes limited estate—Funeral expenses of mother are a charge upon son's estate—Mother's stridhan not liable to pay them.

Under Hindu Law, a mother succeeding as heir to her son takes only a limited estate (a).

The duty of performing the funeral ceremonies of a mother [literally, offering the

Hindu Law—(Continued).**—20.—(Succession)—(Continued).**

funeral oblations (*pinda dana*)] is laid down as a religious injunction binding her son in absolute terms by the Hindu Law. The duty being laid upon him, as her son, independent of any assets left by her, he is bound to discharge it as a sacred obligation attaching to sonship. If he dies during her lifetime, the funeral expenses of the mother have to be defrayed out of his property and not out of her *stridhan*.

According to *Vijnanaswara*, where an act is directed to be done, and the omission to do it is stated to be sinful, the direction imposes upon the person directed an imperative and absolute obligation to do the act. **Vrijbhukandas Dwarkadas v Bai Parvati**, 9 Bom. L. R. 1187=32 B. 26

CHANDAVARNAR AND HEATON, JJ

(3) *Dayabhaga*—Heirship—Sister's daughter—Sister's daughter's son—Succession Certificate Act (VII of 1889)—*Prima facie* title.

When persons alleging to be the sister's daughter and sister's daughter's son of a deceased Hindu, governed by the *Dayabhaga* law, applied for a certificate, under Act VII of 1889, to collect the debts due to the deceased,

Held, without expressing a final opinion on the question, that *prima facie* a sister's daughter and a sister's daughter's son are not heirs under the *Dayabhaga* law, and are, therefore, not entitled to the certificate **Krishna Pada Dutt v The Secretary of State for India in Council**, 12 C.W.N. 453=7 C.L.J. 555=35 C. 631.

MAULIAN, C.J. AND DOSS, J

(4)—*Mitakshara*—Succession—Priority between half-brother's son and full sister—*Vyavahara Mayukha's* view as to sister's position in the line of heirs—*Balambhatta* and *Narada Pandita*, relative values of commentaries by—Rules of interpretation

In cases governed by the *Mitakshara*, a sister comes in as heir to a deceased Hindu immediately after the grandmother, hence, where the competition is between her and a half-brother's son, the latter, being higher in the line among heirs specifically mentioned in the *Mitakshara*, is entitled to preference over her as heir; though it would be otherwise in cases governed purely by the law of the *Vyavahara Mayukha*.

Hindu Law—(Continued).**—20—(Succession)—(Continued).**

The decision of WESTROPP, C.J., (a) so far as it proceeds upon Balambhatta's doctrine, is unsound, and its authority as a binding decision, where the question is between a sister and a half-brother, must be confined to cases to which the law of the Vyavahara Mayukha alone is applicable (b).

The commentary of Balambhatta on the Mitakshara is not regarded by Hindus in the Bombay Presidency as an authority to be accepted in the interpretation of the former work without question. These observations apply more or less to Nanda Pandita also.

It is a well-established rule of the Bombay High Court that where the Mitakshara is silent or obscure, it must, generally speaking, invoke the aid of the Vyavahara Mayukha to interpret it, and harmonise both the works, so far as that is reasonably possible. **Bhagwan Vithoba v Warubai Baborao Mudke**, 10 Bom. L.R. 389 = 32 B. 300.

CHANDAVARKAR AND KNIGHT, JJ.

References —(a) 3 B. 353; (b) 28 B. 82 and 5 Bom L.R. 676, *explained*.

(5) *Mitakshara—Succession—Stridhan of a maiden—Father's mother's sister—Maternal grandfather—Priority between*

Under Hindu Law, the father's mother's sister is entitled to succeed to the *stridhan* of an unmarried female in preference to her maternal grandmother. **Janglubai Shivappa v. Jetha Appaji Marwadi**, 10 Bom. L.R. 522 = 32 B. 409.

CHANDAVARKAR AND HEATON, JJ.

(6) *Exclusion from inheritance—Son of a disqualified heir is not excluded from inheritance—Vesting of estate in a widow—Subsequent birth of a son to the disqualified heir does not divest the estate*

M., a Hindu, died leaving him surviving a widow, and three sons who were deaf and dumb and who were disqualified from inheriting under Hindu Law. M.'s widow accordingly succeeded to the estate of her husband. After M.'s death, one of the disqualified sons married, and a son was born to him. The widow then sold her property to plaintiffs, who sued to recover possession thereof from the defendants (the wife and son of the disqualified son). The

Hindu Law—(Continued).**—20.—(Succession)—(Continued).**

defendants contended that the sale was made without necessity and was, therefore, not binding on the defendants —

Held, that the plaintiffs were entitled to succeed; since both in fact and in contemplation of law the son of the disqualified son had no existence when the estate vested in the widow; and his subsequent birth could not divest the estate.

Held, further, that the son stood in no better position than would have been occupied by his father, if the latter's disqualification had been removed after the widow had succeeded to the inheritance, and in that case, the widow's title would prevail, inasmuch as it was superior to his while his disqualification lasted (a). **Pawadewa v. Venkatesh Hanmant**, 10 Bom. L.R. 559 = 32 B. 455

BACHELOR AND HEATON, JJ.

References —(a) 6 B. 616, *F*, 9 M. 64, *not F*.

(7) *Illegitimate daughter—Sudra.*

Under Hindu Law, the illegitimate daughter of a Sudra is not entitled to inherit in preference to the son of a divided brother **Bhikya Sakharam v Babu Vedu Teli**, 10 Bom. L.R. 736.

BACHELOR AND CHAUBAL, JJ.

References —1 B. 97, 18 B. 177, 1 B.H.C. 117 (123), 8 M. 325 and 8 A. 387, *R*. 1 B. 97; 18 B. 177; 7 M.L.A. 18 (50), 13 M.L.A. 141 (159) and 2 A. 134, *D*

(8) *Non-Stridhan property—Priority between male bandhus and female reversioners—Right to property built by limited owner out of income derived from estate—Succession to Dharmakartaship.*

Where the property is not *stridhanam* or absolute property, a male or regular bandhu (e.g.), a father's sister's adopted son, is entitled to it by virtue of his sex in preference to any female reversioners (e.g.), daughter's daughter, even though the latter may be nearer in degree

Where the daughter of a zemindar inherited his estate and built a palace worth Rs 40,000 out of the income of the estate, *held*, that, though the funds for building were her absolute property, yet the character of the building showed that her intention was to make it a part of the estate, and that, therefore, the building must devolve as part of the estate (a).

Hindu Law—(Continued).**—20.—(Succession)—(Continued).**

Where a Dharmakartaship was transferred to a person though illegally, and it passed to his widow and his daughter successively by will or deed, *held*, that he prescribed only for a hereditary estate and that neither the widow nor the daughter could claim by possession an interest in the property different from what they would have taken if the property had passed by the will or deed, and that it was not open to the person claiming under them (*s.g.*) the daughter's husband, to claim any higher estate (*b*). **Rajah Yenkata Narasimha Appa Rao Bahadur v. Rajah Surnani Yenkata Purushottama Jugganadha**, 4 M.L.T. 5=31 M. 321=18 M.L.J. 409

BENSON AND MILLER, JJ.

References:—(a) 28 M. 1; 25 M. 351, F. (*b*) *Dalton v. Fitzgerald* (L.R. 1897, 2 Ch. 86 (93), F).

(9) *Evidence Act (I of 1872), S. 32 (5)—Pedigree, proof of—Statement as to relationship made by family members before dispute, admissibility—Pleading—Estoppel—Question of fact decided in favour of a party in the first Court—Abandonment of point on appeal, if same may be raised in further appeal—Hindu Law—Mitakshara—Succession—Samanodaka and sister's son—which to be preferred.*

A pedigree put forward by the plaintiffs in support of their claim was accepted by the Court of first instance as proved; but on appeal, the Appellate Court held the evidence adduced in support of it to be worthless, and, moreover, observed that "at the hearing of the appeal practically no attempt was made to support the finding of the Court of first instance."

Held, upon a consideration of the circumstances of the case, that the plaintiffs were not estopped on this appeal from endeavouring to sustain the finding of the Court of first instance in their favour.

Pedigrees which did not constitute ancient family records handed down from generation to generation and added to as a member of the family died or was born, but were drawn up on a particular occasion for a specific purpose by members of the family—must be treated as mere declarations made by the persons who respectively drew them up or adopted them. Such of them as were made *post litem motam* are inadmissible in evidence. But in order to

Hindu Law—(Continued).**—20.—(Succession)—(Concluded).**

make such a statement inadmissible on this ground, the same thing must be shown to have been in controversy before and after the statement was made (*a*).

Plaintiffs' father and the deceased owner were proved to be only six degrees removed from their common ancestor, and being *Samanodakas*, the plaintiffs were held to be preferential heirs to the son of the deceased's sister. **Kalka Parshad v. Mathura Parshad**, 13 C.W.N. 1 (P.C.)=18 M.L.J. 424=4 M.L.T. 380=10 Bom. L.R. 1088=8 C.L.J. 447=5 A.L.J. 701=11 O.C. 362.

LORD ROBERTSON, LORD ATKINSON, LORD COLLINS, SIR ANDREW SCOBLE, AND SIR ARTHUR WILSON.

References:—(a) 4 M. and S. 486, 7 H.L.C. 1 (22), 2 Ir. L.R. 132, F.

(10) *Custom—Khatris of Satgara town, Montgomery district—Burden of proof—Wajib-ul-arz—Riwa-j-i-am—Entries in.*

Held, that the parties to the suit, high caste non-agriculturist Khatris of Satgara town in Montgomery district, were, in matters of succession, bound by Hindu Law and not by custom, and that the fact of record of custom in the *Wajib-ul-arz* of the village and the *Riwa-j-i-am* was not sufficient to apply custom to the present case.

Held, also, that the case was not affected by the admission of applicability of custom made by one of the female parties to the case on a previous occasion. **Ganpat Rai v. Kesho Ram**, 181 P L.R. 1908.

ROBERTSON AND RATTIGAN, JJ.

(11) *Brahmins of Gurdaspur, succession among—Custom—Right of collaterals to succeed in preference to daughters and their sons. See CUSTOMS (PUNJAB) INHERITANCE AND SUCCESSION, No. 17, 3 P.R. 1908.*

(12) *Succession to pitridatta ayautaka—Son or married daughter, preferential heir—Kanya, meaning of. See HINDU LAW (STRIDHANA) No. 1, 12 C.W.N. 924.*

(13) *A Sudra's illegitimate son by a kept woman or continuous concubine can succeed to his father's occupancy holding as male lineal descendant. See ACT II OF 1901 (N.W.P. TENANCY), No. 3, A.W.N. (1908), 229.*

(14)—See HINDU LAW (INHERITANCE).

Hindu Law—(Continued).**—21.—(Unchastity).**

(1) Effect of unexpiated or inexpressible unchastity on rights of inheritance. See HINDU LAW (INHERITANCE), No. 3, 4 N.L.R. 31.

—22.—(Widow).

(1) *Mortgage—Hindu widow acting adversely to adopted son—Collusion with mortgagee—Benefit to estate—Charge upon estate—Lis pendens—Transfer of Property Act (IV of 1882), S. 52—Civ. Pro. Code (XIV of 1882), S. 410—Application to sue in forma pauperis subsequently admitted—Contentious suit or proceeding.*

Where a Hindu widow adopted an adverse attitude against her husband's adopted son, and executed a mortgage in collusion with the mortgagee, not as guardian of such son but in her own right, *held*, that the mortgage could not be enforced against the son to the extent of a debt, which was not a charge on the estate, merely on the ground that the estate was benefited by the payment of such debt (a).

Where, after an application for leave to sue *in forma pauperis* had been made, but before it was granted, the defendant mortgaged part of the property in dispute, and the plaintiff's suit was subsequently, after contest, decreed, *held* that, S. 53, Transfer of Property Act, applied and the mortgage could not be enforced against the plaintiff. **Ambika Partap Singh v. Dwarka Parshad**, 4 A.L.J. 795 = A.W.N. (1908), 29 = 2 M.L.T. 514 = 30 A. 95

• STANLEY, C.J., AND BURKITT, J

(2) *Widow's estate—Alienation of husband's estate without legal necessity—Consent of reversioners—Consent ex post facto—Bhale Sultan Chattri tribe of Oudh—Custom excluding daughter and her issues from inheritance—Proof—General custom—Evidence Act (I of 1872), S. 48.*

In the absence of legal necessity, a Hindu widow can alienate property, to which she has succeeded on the death of her husband, with the consent of the nearest reversioners for the time being. Ordinarily, the consent of the whole body constituting the next reversioners should be obtained, though there may be cases, in which special circumstances may render the strict enforcement of this rule impossible.

The consent of the reversioners is effective even when given after the execution of the deed of transfer (a).

Hindu Law—(Continued).**—22.—(Widow)—(Continued).**

Held that the evidence, adduced in this case, proved the existence amongst the Bhale Sultan Chattris in Oudh, of a general custom, excluding daughters and their issues from inheritance. **Bajrangli Singh v. Manokarnika Baksh Singh**, 12 C.W.N. 74 (P.C.) = 9 Bom. L.R. 1348 = 6 C.L.J. 766 = 3 M.L.T. 1 = 5 A.L.J. 1.

LORD MACSAGHTEN, SIR ANDREW SCOBLE
AND SIR ARTHUR WILSON.

References.—(a) 17 C. 896, *Alpr.*, 6 A. 116, *disappr.*; 10 C. 1102; 21 M. 128 and 25 B. 129, R.

(3) *Wife's right to reside in family house—Sale of house for family debt.*

A Hindu widow may be turned out of the family house, if the debts, on account of which alienation is being made, are *bona fide* family debts. The Mahomedan wife or widow is a creditor of her husband on account of her dower, which is a debt; and she is, perhaps, as regards his estate, a creditor preferred to all other creditors. But a Hindu wife or widow is no creditor on account of her maintenance or right of residence. If the estate had dwindled to nothing, as a consequence of family expenditure and family debts incurred by her husband in the ordinary way of business and living, there remains nothing for her, any more than for her husband or his heirs. **Nihal Devi v. Shib Dial**, 36 P.R. 1907 = 11 P.L.R. 1908 = 118 P.W.R. 1907 (*Sup.*)

JOHNSTONE AND SHAH DIN, JJ.

References.—2 A. 315; 2 M. 126, 6 M. 130, 12 M. 260; 17 B. 398, 39 P.R. 1996, *referred to*.

(4) *Hindu Law—Will—Gift of immoveable property to a Hindu widow—Malik—Absolute estate.*

When the question was whether a Hindu widow acquired a right to alienate the property (immoveable) in suit, under a deed of gift or testamentary disposition of her late husband, wherein the word used was *malik wa khud akhthiyar*, their Lordships held that, in order to cut down the full proprietary rights that the word *malik* imports, something must be found in the context to qualify it, and that the fact that the donee was a woman and a widow did not suffice to displace the presumption of absolute ownership implied in the word *malik*.

Hindu Law—(Continued).**—22.—(Widow)—(Continued).**

The donee in the case of *Lalit Mohan Singh Roy v. Chukkun Lal Roy* (a) was a man, but the principles of interpretation laid down in that case were of general application (b). **Mussammat Surajmani v. Rabi Nath Ojha**, 12 C.W.N. 231 (P.C.).

LORD ROBERTSON, LORD COLLINS AND SIR ARTHUR WILSON.

References:—(a) 24 I.A. 76 = 24 C. 834, R. (b) 24 W.R. 395, R.

(5) *Reversioners—Compromise by a widow in suit followed by decree—effect of.*

Held, that a compromise made by a person holding a Hindu widow's or Hindu daughter's estate in the property of a deceased husband or father is not binding on the reversioners, even though it has been followed by a decree of Court, and that the reversioners can only be bound by a decree made after a full contest. **Mahadei v. Baldeo**, 5 A.L.J. 43 = A.W.N. (1908), 16 = 30 A. 75.

STANLEY, C.J. AND BURKITT, J.

Reference.—A.W.N. (1907), 151, F.

(6) *Alienation—Consideration binding on reversion—Suit by reversioners to set aside sale deed—Offer to recompense alienees—What Court could not decree.*

A Hindu widow is not bound to mortgage any portion of her husband's estate, if that be more prejudicial to her than a sale by reducing her income to a greater extent, as she does not hold the property for the benefit of the reversioner, nor is she bound to raise money on her personal security.

Where a sale deed executed by a Hindu widow was proved to have been effected for the purpose of discharging debts binding on the reversion, the purchase money being found to have been applied in payment of those debts, and where it was not shown that the widow could have paid off these debts otherwise than by a sale of the property, *held*, that the right of the heir to set aside the sale deed and recover possession of the property from the widow's purchasers, depended upon his refund of, at least, the purchase money binding on the reversion, and that the reversioner, suing to set aside a widow's sale, should offer to reimburse the bona fide purchaser so much of the money as had been legitimately advanced (a).

Hindu Law—(Continued).**—22.—(Widow)—(Continued).**

Courts could not properly decree in the lifetime of the widow that, upon her death, the deeds should be set aside upon payment, by the persons who should succeed to the estate, of the amount which the widow was entitled to raise, inasmuch as it would be contingent upon the will of the persons who might succeed to the inheritance whether they would pay the amount or not, and the purchaser could not properly have been placed by a decree of the Court in a position in which, for many years, he might remain in a state of uncertainty as to whether or not he could safely expend capital in the improvements of the estate. Such a decree would have been unjust to the purchaser and it would be contrary to public policy to place an estate in that position in which it could not be known whether the estate could be safely improved or not. **Singan Setti Sanjivi Kondayya v. Draupadi Bayamma**, 18 M.L.J. 11 = 3 M.L.T. 251 = 31 M. 153.

BODDAN AND SANKARAN NAIR, JJ.

References:—(a) 11 B.L.R. 416, F, (b) 9 W. R. 108, F; 9 W.R. 284, A.S. No. 119 of 1901 of the Madras High Court, It; 25 A. 330, not F.

(7) *Widow—Mortgage by Hindu widow—No legal necessity—Mortgagee spending money for repairs on the mortgaged property—Reversioners suing to recover the property not bound to pay the money—Mortgagee cannot be allowed to remove the house built by him on the property.*

The money spent by a mortgagee, in repairs of the property, which is mortgaged to him by a Hindu widow, without any legal necessity justified by Hindu Law cannot be recovered by him, from the reversioner, who sues on the widow's death to recover the possession of the property.

If the mortgagee has erected a building on the property, he cannot claim a right to remove the building, before he is made to hand over the possession of the property to the reversioner (a). **Vijbhukandas Dwarkadas v. Dayaram Jadav**, 9 Bom. L.R. 1181 = 32 B. 32.

CHANDAVARKAR AND HEATON, JJ.

References:—(a) 9 Bom. L.R. 404; 20 B. 298; 6 F.H.C.A.C. 80, D.

(8) *Mitakshara—Widow inheriting moveables from her husband—Limited rights—She cannot make a gift of the property.*

Hindu Law—(Continued).**—22.—(Widow)—(Continued).**

Under the Mitakshara, a Hindu widow inheriting moveable property from her husband who dies childless and intestate, does not take an absolute interest in the property. She is, therefore, not competent to make a gift of the property. **Pandarinath Visvanath v. Govind Shivaram**, 9 Boin. L R 1305=32 B. 59.

RUSSELL, A.C.J., AND HEATON, J.

(9) *Alienation by—Alienee having knowledge of the existence of funds to discharge husband's debts—Effect of such knowledge.*

A Hindu widow alienated a portion of her deceased husband's estate. The question was whether it was binding upon the estate. It was found that a large portion of the consideration was required to meet a decree-debt of the widow's husband binding upon the property. It was found at the same time that, at the date of alienation, the widow had sufficient funds of her husband to pay off the said decree-debt, and that the alienee was aware of the existence of such funds which the widow might have applied in discharge of the decree-debt. *Held*, that, in the case of a person with the knowledge of the alienee, no equities arose because he practically assisted the widow to dissipate the estate (a). **Srinivasa Sastrigal v. Panchanatha Royer**, 3 M.L.T. 323.

BENSON AND MUNRO JJ.

Reference —(a) 14 B.L.R. 226, D.

(10) *Gift to widow and a male jointly—Whether widow entitled to an absolute estate or merely a widow's interest.*

In a suit, in which a male and a Hindu widow were co-plaintiffs, a compromise was arrived at, between them and the defendant, whereby the latter gave certain properties in full ownership to the two plaintiffs. But for the compromise the widow would have only a widow's interest.

Held, looking to the language of the deed of compromise, which was exactly the same in respect of both the donees and other circumstances, the widow took not a mere widow's, but an absolute estate. **Sambasiva Aiyar v. Venkateswara Aiyar**, 3 M.L.T. 369=31 M. 179.

WHITE, C.J., WALLIS AND MILLER, JJ.

References —24 C. 670, F.; 6 M.I.A. 1, D.

(11) *Maintenance—Re-marriage of widow.*

During the lifetime of her husband the wife of a Hindu obtained a decree for maintenance

Hindu Law—(Continued).**—22.—(Widow)—(Continued).**

against him and the payment of this maintenance was by the decree made a charge on certain property which had been of the husband, but was then in the hands of certain donees from him. The husband died, and the widow, being permitted to do so by the rules of her caste (*halwai*), married again. *Held*, that the fact of the widow having married again did not disentitle her from recovering maintenance from the property of her first husband. **Kaunsilla v. Gajadhar**, A.W.N. (1908), 149

KNOX, J.

References —5 C. 776, 17 C. 674, R

(12) *Woman's estate—Simple bond executed by Hindu widow for legal necessity—Decree, personal—Sale does not affect reversioner.*

A Hindu widow was sued on a simple bond executed by her for legal necessity and property left by her husband was sold in execution of the decree obtained in the suit.

Held, that the bond did not bind any immoveable property and the interest of the reversioners was not affected by the sale. **Giribala Dassi v. Srinath Chandra Singh**, 12 C.W.N. 769.

RAMPINI AND SHARFUDDIN, JJ.

(13) *Widow in possession of husband's estate as inferior proprietor—Effect of enlargement of estate of inferior proprietor by action of Government—Mukaddam.*

An under-proprietor, whose status was described by the term "mukaddam," died, and his estate devolved upon his widow. Whilst this estate was in the possession of the widow, the Government proceeded to make a settlement with the mukaddams, excluding the superior proprietor, to whom an allowance by way of *malikana* was given. *Held*, that the enlarged estate of which the widow thus became possessed was still a Hindu widow's estate merely the action of Government had not the effect of making her a zamindar with a title independent of that which she derived from her husband. **Kashi Prasad v. Inda Kunwar**, A.W.N. (1908), 222=5 A.L.J. 590.

STANLEY, C.J. AND BANERJI, J.

Reference —1 W. and T., 7th edn, p. 693, R.

(14) *Competence of Hindu widow to alienate husband's estate for his spiritual benefit.*

Hindu Law—(Continued).**—22.—(Widow)—(Continued)**

Although a Hindu widow is capable of alienating a portion of her deceased husband's estate for purposes supposed to be conducive to his spiritual benefit, the law will not support a gift of almost the entire estate in favour of the husband's spiritual preceptor. **Balkishnan Bharthi v. Sat Ram Singh**, A.W.N. (1908), 202.

BANERJI, J.

References:—A A. 482; 8 M.I.A. 500; 8 M. 552 and 22 C. 506, R.

(15) *Maintenance—Widow having fund from her husband's estate to maintain her for five years—Suit for arrears of maintenance premature.*

The plaintiff filed a suit in February 1904 to recover her arrears of maintenance. At that time she was in possession of a fund belonging to her husband's family estate, which fund was sufficient to provide for her maintenance for five years at the rate allowed by the Court.

Held, that no cause of action had accrued to the plaintiff. In 1904 the Court was not in a position to forecast events or to anticipate the position of affairs five years later, in other words, it was not in a position to make a decree for maintenance. And no liability to provide maintenance could in the then existing circumstances attach to the appellant. **Dattatraya Waman v. Rukhambai Pandurang**, 10 Bom. L.R. 770.

BATCHELOR AND CHAUBAL, JJ.

(16) *Acquisitions out of the income of widow's estate—Power of alienation—Bona fide purchaser for value—Burden of proof.*

Held, that if property acquired by a Hindu widow out of the income of her late husband's estate be treated by her as an accretion to the said estate, she cannot alienate it except for legal necessity; if, on the other hand, she clearly shows her intention to keep the property so acquired separate from the corpus of the estate, it may be regarded as an investment of accumulated savings over which the widow has full disposing power.

Held further, that in the absence of evidence as to the intention of the widow, it is not equitable to throw the burden of proof on a bona fide purchaser for value.

Held also, that no presumption can be drawn from the mere fact that the property acquired

Hindu Law—(Continued).**—22.—(Widow)—(Continued).**

consisted of shares of other members in the family property (a). **Jokha Singh v. Musammatt Dulari**, 11 O.C. 310

PIGGOTT, A J.C.

References:—(a) 10 C. 324; 1 Agra 219; 25 W R. 335; 14 C. 387, 14 C. 861 and 25 M. 351, R.

(17) *Right of residence in family-house—Not alienable—Not attachable in execution.*

The right of a Hindu widow is to live in the husband's family-house (a).

She has no right to insist on residing in any particular house; and ordinarily when living with the members of her husband's family, she must accept such reasonable arrangement for her residence therein as they may make for her. The interest is, therefore, restricted in its enjoyment to her.

It could not have been contemplated by the Hindu law-givers to allow the transfer of such interest. The case may be different where lands or other property may have been allotted to a widow in lieu of her claim for maintenance. But with respect to the portion of the house granted only for her personal use, her rights of enjoyment cannot be transferred. Recognition of the right of sale might be oppressive to the family and would result in allowing the widow a right to choose a separate residence, even where she is not entitled to do so under the Hindu Law. **Salakshi v. Lakshmayee**, 4 M.L.T. 485.

SANKARAN NAIR AND ABDUR RAHIM, JJ.

References —(a) 12 M. 260 and 27 M. 50, R.

(18) *Remarriage, effect of—Alienation—Legal necessity—Reversioner.*

If a transfer is made by a Hindu widow for legal necessity and before her remarriage, the position of the purchaser from the widow remains unaffected by her subsequent marriage. Unless the transfer was for legal necessity, it cannot bind the reversionary heir, who will be entitled to take the property from the purchaser after the death of the widow or after she had forfeited her estate by reason of her marriage (a).

Quære:—Whether on principle an unauthorised alienation by a widow ought to be allowed to subsist beyond the extinction of her own title which alone could pass to her

Hindu Law—(Continued).**—22.—(Widow)—(Continued).**

transferee. **Nitya Madhav Das v. Srinath Chandra Chuckerbutty**, 8 C.L.J. 542.

MOOKERJEE, J.

References.—(a) 19 C. 389; 22 C. 589; 1 M. 226; 22 B. 321 (F.B.); 24 B. 89 (93), F.; 11 A. 330 and 20 A. 476, Diss.

(18-a) *Widow's estate—Family settlement to settle dispute to which widow party, if binds reversioners.*

A family settlement putting an end to a dispute between the members of the same family, to which a Hindu widow is a party, cannot bind the reversioners to her husband on her death.

A plea that such a settlement was binding on the reversioner was disallowed when the party who benefited by the transaction was found to have known that he had not the right he set up. **Asharam Sadhani v. Chandi Churn Mukerjee**, 13 C.W.N. 147.

MITRA AND BELL, JJ.

(19) *Conveyance by a widow of her life estate to reversioner—not invalid by reason of contemporaneous agreement between the widow and the reversioner*

Where a Hindu widow conveyed the whole of her limited estate to the next reversioner (her husband's brother) in consideration of an undertaking by the reversioner that he would re-convey the greater portion of the property to a person named by her (namely, her brother), the validity of the transaction is not affected by the fact that it was carried out in pursuance of an undertaking that the reversioner should retain a portion of the property for himself and convey a portion to a third party. The title of a third party who derived interest from the reversioner and the reversioner's title cannot be impeached by the other reversioners.

Per Sankaran Nair, J.—The validity of the renunciation is quite independent of the validity of any agreement as to the disposal or enjoyment of the property by the alienee.

The surrender of her estate by the widow and the consequent vesting of the estate in the presumptive reversioner may be compared with the case of an adoption by the widow which has the effect of divesting her of her estate and vesting it in the adopted son, her husband's heir, the effect of both the transactions being

Hindu Law—(Continued).**—22.—(Widow)—(Continued).**

the same so far as the widow and the actual reversioner at the time of her death are concerned.

And as an adoption cannot be set aside on the ground of improper motives, so the validity of a surrender by a widow which stands on a higher footing cannot be affected by her motive or by any such conditions as may be imposed by her. **Challa Subbiah Sastri v. Palury Pattabhiramayya**, 31 M. 446.

SIR ARNOLD WHITE AND SANKARAN NAIR, C.J. AND J.

References.—31 M. 366, R.; 22 C. 354, R. and F.; 31 M. 366; 30 A. 1; 29 M. 120, 13 M.L.J. 323; 22 C. 354 at p. 363, 31 M. 366; 16 I.A. 53 at pp. 55, 59, 22 B. 558, 26 I.A. 113, I.; 22 M. 398, 21 A. 460; 22 C. 354.

(20) *Hindu Law—Simple debt due by a widow—Legal necessity—Only life estate saleable in execution—Res judicata between co-defendants.*

When a creditor lends money to a Hindu widow on her personal security and not upon any mortgage of her husband's property, any decree which he obtains on his simple money bond can only bind the rights and interests of the widow, even though the loan was incurred by her for legal necessity (a).

The plaintiffs brought the suit for possession against the defendant, alleging that the mortgage which he held had been satisfied by the usufruct. The plaintiffs and the defendant were co-defendants to a suit for redemption which had been brought by a third party who represented only a portion of the equity of redemption. The plaintiffs, who were defendants to that suit did not defend it, although they might have then pleaded that the plaintiff to that suit was not entitled to the whole of the equity of redemption, and that they had also an interest in it as reversioners. In their present suit the plaintiffs claimed possession of a portion of the property setting up their right to it as reversioners. *Held*, that their present suit was not barred by res judicata, although they might have pleaded their title as owner of a portion of the equity of redemption in the former suit, as it was not incumbent on them to do so, and as the former suit was brought by a person representing a

Hindu Law—(Continued).**—22.—(Widow)—(Continued).**

co-mortgagor who was entitled under the law to redeem the whole of the property and there could not be said to be any conflict of interest between the co-defendants to that suit, which it was necessary for the Court to decide in order to give the relief claimed by the plaintiff to that suit. **Kallu v Faiaz Ali Khan**, 5 A L. J. 367 = A W.N. (1908), 173 = 30 A 394

KNOX AND AIKMAN, JJ

Reference.—(a) A.W.N. (1897) 67, *F. Mayne's Hindu Law*, Para 64, 7th Edition, R.

(21) Release of reversion by next reversioners to widow—Alienations by widow, how far binding, on next reversioners. See HINDU LAW (REVERSIONERS), No. 4, 3 M.L.T. 355

(22) Property passed to widow not as heir, but by deed or other arrangement conferring on her absolute powers—whether ordinary restrictions apply to such property. See HINDU LAW (REVERSIONERS), No. 2, 10 Bom. L. R. 210.

(23) Dayabhaga—Will—Widow when merely entitled to maintenance—Whether she can contest validity of grant to Thakurs—Whether right to and amount of, maintenance can be limited by will—Restriction as to place of residence—Just cause for disregarding restriction—Objection to living in the same house with concubines and in uninhabitable house—Power of Court to vary maintenance fixed by the testator—Maintenance of chaste widow, calculation of. See HINDU LAW (WILLS), No. 5, 12 C.W.N. 806.

(24) Alienation by Hindu widow—Suit by reversioner during life-time of widow to have alienation declared void except for her life—Art. 125, Sch. II, Limitation Act, governs case. See HINDU LAW (ALIENATION), No. 9, 12 C.W.N. 857.

(25) Widow succeeding to the property as *gotraja sapinda*, whether has power to make adoption. See HINDU LAW (ADOPTION), No. 4, 10 Bom. L.R. 692.

(26) Alienation by Hindu widow—Consent of female reversioner, whether passes absolute estate to transferee—Whether consent gives rise to presumption as to propriety of transaction. See HINDU LAW (ALIENATION), No. 19, 12 C.W. N. 914.

(27) Position of widow in joint Hindu family after adopting a son—Alienation by the widow

Hindu Law—(Continued).**—22.—(Widow)—(Concluded).**

before adoption—Right of the adopted son to dispute the alienation. See HINDU LAW (ADOPTION), No. 7, 10 Bom. L.R. 1029.

(28) Widow claiming under husband's will to be absolute owner—Alleged reversioners compromising suit and executing release of all supposed claims—whether compromise and release illegal. See TRANSFER OF PROPERTY ACT, No. 4, 18 M.L.J. 469.

(29) Lease by—Good bargain by widow not prejudicing reversioners, to be given effect to—Conditions under which Hindu widow can alienate property apart from legal necessity—Widow not agent of reversioner. See HINDU LAW (REVERSIONERS), No. 6, 3 C L J. 458

(30) See HINDU LAW (ALIENATION).

(31) See HINDU LAW (REVERSIONERS)

(32) Competency of Hindu widow to sell property, liable to pre-emption, to uterine brother in preference to co-sharers—*Waqf-ul-arz* See PRE-EMPTION, No. 17, A.W.N. (1908), 59

(33) Will by widow with consent of the next reversioner—Validity. See WILL, No. 3, 1 Sind L. R. 196.

—23.—(Wills).

(1) *Hindu will—Construction—Bequest to widow—Power of appointment—Bequest for life with power of alienation—Gift over.*

A will, addressed by the testator to his wife, was to this effect “You are my legally married wife and entitled to the property to be left by me. Should I on a sudden die you shall under this will become possessor of my properties, &c., and perform my *shradh* at a suitable cost . and for the benefit of my soul you shall purchase a house and establish a *Mohadev* in it and perform its *sheba* and services, &c., and you shall fix a suitable allowance as *pranam* for my spiritual guide. You will have the right and power to alienate by gift or sale all the aforesaid moveable and immoveable properties.

My daughter Sreemutty Hara Kumari shall become entitled to and possessor of whatever properties will remain after your death and she shall enjoy the same, keeping up and maintaining the aforesaid *shebas*, &c. . . The said daughter shall have the same rights in the aforesaid properties as you have, and he to whom my said daughter may willingly give away those

Hindu Law—(Continued).**—23.—(Wills)—(Continued).**

properties shall possess the same and enjoy them keeping up and maintaining the *shebas*, &c."

Held, that giving effect to all the words of the will, the widow took an estate for life with a power of alienation, and, to the extent to which such power was not exercised, the daughter similarly took the property. **S. M. Hara Kumari Dasi v. Mohim Chandra Sarkar**, 12 C.W.N. 412=7 C.L.J. 540.

MACLEAN, C.J. AND COX, J.

(2) *Hindu Law — Will — Construction—Bequest to "daughters and their respective sons"—Restriction of descent to male issues—Absolute or life-estate—Woman's estate—Survivorship between daughters—Spiritual benefit—Remainder over to sons—Gift over to daughters on failure of adoption—Succession Act (X of 1865), Ss. 82, 116 and 117.*

In construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, specially an ancestral estate, shall be retained in his family, and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate (a).

In the will of a Hindu drawn up in the English language and probably by an English Solicitor who was one of the attesting witnesses, it was provided, in case of the failure of a prior bequest in favour of a son to be adopted to the testator, (which bequest in fact failed) that the estate was to be made over to and divided between his two daughters in equal shares, "to whom and their respective sons he gave, devised and bequeathed the same" There was a proviso that in the event of one of the daughters dying without leaving any male issue surviving, the share of the deceased daughter was to go to the surviving daughter and her sons—to the exclusion in both cases of female issue. Further, that "in the case of the death of either daughter leaving sons, the share of such daughter was to be paid to such her son or sons' share and share alike."

Held, that under the will the testator's daughters whom he incontestably intended to

Hindu Law—(Continued).**—23.—(Wills)—(Continued).**

benefit were to have no more than what is generally known to be a woman's estate in his property ;

That the testator intended to create in their favour an estate for life with a remainder over to their sons ;

That in the events that happened the daughters were entitled to the testator's estate in equal shares for life and with the benefit of survivorship between themselves. **Radha Prosad Mullick v. Ranimoni Dassi**, 12 C.W.N. 729 (P.C.).

LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOBLE AND SIR ARTHUR WILSON.

Reference .—(a) 2 I A.7, F

(3) *Rules as to construction of—Intention of, testator—Absolute estate.*

A Hindu, owning absolute moveable and immoveable property, being without issue, made a will wherein it was stated that he was to continue to be the *Malik* of all his property as long as he lived, that after his death, his wife and his sister-in-law, who was joint with him, were to be the *Malik*, and that his wife so long as she remained chaste, and his sister-in-law during her life were to maintain themselves from the rents of the property, without alienating the property unless for some urgent necessity ; and at the end of the will a postscript was added to the effect that his wife and sister-in-law were empowered to alienate the immoveable property in which none else had any interest or claim.

Held, that on the proper construction of the will, the widow and the sister-in-law took absolute estates in the property.

Held also, that in construing a will of this sort the Court will have regard to the following rules collected from the various decisions in previous cases on the subject.

(1) The actual intention of the testator must, as far as possible, be ascertained from the contents of the will itself, considered as a whole, and every clause in it being given effect to (a).

(2) When the will contains a clear expression of intention, effect must be given to it, unambiguous dispositive words not being taken as controlled or qualified by any general expression of intention (b).

Hindu Law—(Continued).**—23.—(Wills)—(Continued).**

• (8) Where some of the provisions of the will could not be reconciled with one another, and the actual intention of the testator could not be ascertained by any means, effect should be given to the last words.

(4) The Court should consider in construing a will such "surrounding circumstances" as may affect the meaning to be attached to the words used in it, e.g., the state of the testator's family; what issue, if any, he left; what near kindred he had; the usual customs, practices, notions, and wishes of his race or caste (d).

(5) Clear words of inheritance, as also words which clearly give a power of disposition, e.g., "to my wife, her children and grand-children," "to my wife, her heirs and assignees" show an intention to confer a heritable and alienable estate (e).

(6) Also words such as "shall become *Malik* of my property" or "I appoint my wife to the *Malikatwa* as exercised by myself" confer a heritable and alienable estate, in the absence of indication of different intention (f). But "surrounding circumstances" may suggest a different intention, and it is possible that words such as "my wife is the owner after me," "my wife is the heir," or "shall be my heir and *Malik*" intend merely emphatically to protect her peaceable possession and management during her life-time (g).

If an absolute estate be clearly given and words are superadded restricting the power of alienation, or imposing any other restriction which is repugnant to the estate given, the restriction should be rejected (h). **Goverdhandas v. Yantbai**, 1 S.L.R. 211.

LOCUS, J C., AND CROUCH, A. J. C

References:—(a) 8 Bom. L.R. 842; 12 I.A. 103 (110), R. (b) 24 I.A. 76, R. (c) 7 Bom. L.R. 236, R. (d) 6 M.L.A. 526 (550), 2 I.A. 7; 11 B. 573 (579); 17 B. 503; 22 B. 409, R. (e) 24 I.A. 76, 11 B. 573 (579); 21 B. 376, R. (f) 24 I.A. 76; 24 C. 406; 27 C. 649, R. (g) 21 B. 376; 23 B. 80; 19 A. 16; 24 M. 357; 27 M. 498, R. (h) 5 I.A. 138; 24 I.A. 76, R.

(4) **Construction—Hindu widow—Dedication of property to idol, if valid—"Malik," meaning of—Words, if imply absolute ownership—Limited grant, if and when effective**

Hindu Law—(Continued).**—23.—(Wills)—(Continued).**

—*Suit for declaration of property to be debutter—Civ. Pro. Code (Act XIV of 1882), Ss. 244 and 280—Mortgage decree—S. 244, applicability of.*

The effect of the word "*Malik*" is to confer on the donee a heritable and alienable estate (a).

But the effect of the word "*Malik*," may be modified by the context, or, in other words, in order to cut down the full proprietary rights that the word imports, something must be found in the context to qualify it (b).

The Court must, in construing a will, look to all the clauses of the will, and give effect to all the clauses, ignoring none as redundant or contradictory.

Held,—on a construction of the will in the present case, that there is ample indication in the context, to displace the presumption of absolute ownership implied in the word "*malik*" and to justify the conclusion that the gift in favour of the widow must be cut down to something less than a full proprietary right with power of alienation; that it is impossible to maintain that any absolute devise was made to her, that she took a limited estate under the will, that so far as the will is concerned her powers of alienation were confined to the dedication of property for the benefit of ancestral idol, and the alienation of the property in case of necessity, and that the dedication to a new idol she has established or installed is invalid and the dedicated property is not *debutter*

Per Mookerjee, J.:—S. 244 of the Civ. Pro. Code has no application to the case where the judgment-debtor tries to set aside the effect of the decree itself. In the case of a mortgage decree, the decree itself directs the sale of the property, and, if objection is taken that the property cannot be sold, because it belonged, not to the judgment-debtor, but to a party who is a stranger to the suit, the propriety of the decree is called in question. A question of this description must be tried in a regular suit and not in the execution proceedings which are based on the assumption that the decree is a good and valid decree (c). **Shib Lakshan Bhakat v. Srimati Tarangini Dasi**, 8 C.L.J. 20.

STEPHEN AND MOOKERJEE, JJ.

References:—(a) 24 W.R. 895 and 24 I.A. 76, F; (b) 7 C.L.J. 131, F; and (c) 32 C. 265, referred to.

Hindu Law—(Continued).**—23.—(Wills)—(Continued).**

(5) *Dayabhaga widow when merely entitled to maintenance, if can contest validity of grant to Thakurs—Maintenance, right to and amount, if can be limited by will—Residence, restriction as to place of—“Just cause” for disregarding restriction—Concubines, objection to living in the same house with—Uninhabitable house.*

Where a testator died leaving a widow and an adopted son.

Held, that the widow could ask for a construction of the will only in so far as it affected her claim to maintenance and not of the whole will (a).

That she had no *locus standi* to question the validity of certain provisions in the will relating to the establishment and maintenance of certain Thakurs.

A widow cannot be deprived of her right to maintenance by any provision in a Dayabhaga will.

Per Caspersz, J.—The amount of maintenance fixed by the testator, when it is not a nominal amount and not contrary to any provision of Hindu Law, cannot be varied by the Court.

Per Cox, J.—The husband has no right to reduce the amount of a chaste widow's maintenance below the proper provision, which has to be calculated on (1) the value of the estate, (2) the position and status of the deceased husband and the widow. Great weight should, however, be attached to a statement in the husband's will as to the amount, not as a legal limitation to the widow's right but as evidence of what in the husband's estimate a lady in the position of his widow should need. But a husband may, within limits, lay down that his widow shall forfeit her maintenance if she does not live in the family house.

Per Caspersz, J.—A Hindu widow is not obliged to live a life of asceticism. She is bound to perform various religious, social and domestic ceremonies. She is not entitled to a bare subsistence or a starving allowance.

Where the will provided that the widow was to receive Rs. 125 a month as maintenance, provided she lived either in his house at Madhupur or his house at Benares and it was found that testator's concubines lived in the Benares house and the Madhupur house was uninhabitable,

Hindu Law—(Continued).**—23.—(Wills)—(Continued).**

table, and the widow proposed to live with the adopted son in Calcutta.

Held, (*per Curiam*) that she had just cause for refusing to live in the Madhupur or Benares house, and a sum of Rs. 320 a month was a proper allowance for her maintenance under the circumstances—and the said amount should be made a charge upon the estate.

Semble. Gifts to idols which are to be established after the testator's death are bad in law (b). **Promotha Nath Roy v. Nagendrabala Chaudhrani**, 12 C.W.N. 808=8 C.L.J. 489.

CASPERSZ AND COXE, JJ.

References.—(a) 11 C. 492 and 4 C.W.N. 602, R (b) 2 C.W.N. 295=25 C. 405, 6 C.W.N. 267=29 C. 260 (273); 7 C.W.N. 121=30 C. 521 and 7 C.L.R. 278, *relied on*.

(6) *Last male owner's will making daughter's son karta—Daughter's husband's claim—Construction of will.*

Where a will ran “if no boy is adopted and if our daughter has a son, that boy becomes or will become a *dauhitra karta* according to the law, so, that boy alone should become the *karta* for the entire property belonging to us,” *held*, that those words could be construed as appointing a daughter to raise a son, only if there were in existence a living custom to which the words can be referred. **Narasimha Appa v. Venkata Purshottama**, 4 M.L.T. 9=31 M. 310=18 M.L.J. 420.

BENSON AND MILLER, JJ.

References.—2 I.A. 163 and 28 M. 363, R.

(7) *Construction of “given to daughter-in-law for sustenance, etc.”*

Where a devise was in the following words “given to T, widow of my son S, who died issueless, for her sustenance and other things as requested by her,” and then by a general clause the testator said “thus I have given away twenty *velas* of lands to the above persons, as gift and out of sympathy, so that they may enjoy them as they like with all ownership rights, with power of alienation by gift, sale, exchange, etc.,” and it is found that the extent of twenty *velas* can be made up only by including the gift to T, *held* that she took an absolute estate under the will. **Ramachandra Naiker**

Hindu Law—(Continued).**—23—(Wills)—(Continued).**

v. Vijayaragavalu Naidu, 4 M.L.T. 198=31 M. 349.

WHITE, C.J. AND MILLER, J.

(8) Construction of—Feeding and paying Brahmins, if valid bequest.

A direction in a will for feeding and paying the Brahmins on the day following the night of Sivaratri is a valid bequest. **'Kedar Nath Dutt v. Atul-Krishna Ghose**, 12 C.W.N. 1083.

FLETCHER, J

References.—4 C 443; 6 B. 24; 17 B. 351, F.

(9) Construction of—Res judicata—Partition by sons—“Shall divide my properties among my sons in equal shares,” if operative as gift—Mother's share, how far affected by shares otherwise inherited by her—Estimating mother's share—Stridhan from her husband's estate, credit for—Form of decree.

The decision in a former suit, of questions not absolutely necessary for the determination of that suit, cannot be regarded as *res judicata* between the same parties in a later suit.

If there be an express gift to the sons by a will of all the testator's properties, his widow's right to a share on partition by the sons is defeated (a).

The direction in a will—“On my youngest son, attaining the age of 21 years the said executrix shall divide my properties among my sons in equal shares” was construed not to operate as an express gift in favour of the sons but only to postpone partition to a particular date (b).

When a Hindu mother is otherwise entitled to a share in lieu of her maintenance on the partition of the father's estate by the sons, her right is not affected by the fact that she has already inherited a share of the same estate from one of her deceased sons (c).

In estimating the share which a mother is entitled to in lieu of her maintenance out of the father's estate, credit must be given for any property which she has received as *stridhan* from the father's estate (d). **Poorendra Nath Sen v. Srimati Hemangini Dassee**, 12 C.W.N. 1002

CHITTY, J.

References.—(a) 17 C. 886, F. (b) 12 C. 165, F; 19 C. 292, D. (c) 3 C. 149, F. (d) 12 C. 165, 12 B.L.R. 985.

Hindu Law—(Concluded).**—23.—(Wills)—(Concluded).**

(10) Power of appointment, validity of—Person appointed, qualifications necessary.

Held that, a Hindu testator has a right to grant a power of appointment to a person named in his will, by which the final devolution of his estate should be regulated at the termination of a life estate created under the will.

Held further, that the person capable of taking under the will must be such a person as could take a gift *inter vivos*, and therefore must either in fact or in contemplation of law be in existence at the death of the testator (a). **Narayan Singh v. Lal Ramesh Singh**, 11 O.C. 271 (B).

EVANS AND PIGGOT, A.J.CS

References.—(a) 9 O.C 119, 5 C 684, 24 I.A. 93 and 9 B.L.R 377, R.

(11) Bequest to widow and son jointly—Nature and effect.

Where a Hindu made a bequest of some of his property to his wife and one of his sons jointly, **held** that the two together took an absolute estate under the will.

There is no principle of construction on which it can be held that a son takes only a limited estate, so that, even if there were a presumption that a widow takes only a widow's estate under a husband's will, all the residual rights of ownership must nevertheless be in the son. **Tikamdas Jethanand v. Phatmal Jethmal and others**, 1 S.L.R. 249.

GROUCH, A.JC.

Hindu Temple

(1) Worship, right to exclusive—Temple of Shiva in Southern India—Right of Shanars or Nadars to worship—Custom—Trustee surrendering decree on appeal—Power of Court to join beneficiaries as plaintiffs—Compromise, unlawful—Civil Procedure Code (Act XIV of 1882), Ss. 375, 437—Breach of trust—Introducing new worshippers contrary to usage.

Where it was proved that men of the “Shanar” or “Nadar” caste were by custom not allowed to worship in a temple dedicated to Shiva in which the customary ceremonies of Hindu worship were carried on;

Hindu Temple—(Concluded).

held, that arguments directed against the soundness of the doctrine as to the exclusion of the Nadars and showing inconsistencies in the treatment of the Nadars by the worshippers at the temple in other respects were of no avail and could not be entertained.

Where the hereditary trustee of the temple, after a decree had been made in his favour as representing the worshippers at the temple and pending an appeal by the Shanars, sought to enter into a compromise with them by admitting their right to worship in the temple contrary to the decision of the Court, and it was alleged and not disproved that he did so from a corrupt motive;

held, that the appellate Court very properly reinforced the cause of the worshippers of the temple by joining certain new plaintiffs.

The principles applicable to the case of a trustee who betrays his trust by surrendering a decree were well stated and applied by the High Court.

In all cases where the Court sees that the trustees are wholly uninterested in the matter and there are parties who are materially interested in the question, it never makes a decree in the absence of those parties who are alone interested in the contest (a).

It is the duty of the trustee to maintain the customary usage of the institution, and if he fails to do so he is guilty of a breach of trust and still more so, if he deliberately attempts to effect a vital change of usage and to make it binding on the worshippers by obtaining a decree of the Court to establish it (b) **Sankaralinga Nadan v. Raja Rajeswara Dorai**, 12 C.W.N. 946 (P C).

LORD ROBERTSON, LORD ATKINSON, LORD COLLINS, SIR ANDREW SCOBLE AND SIR ARTHUR WILSON.

References —(a) L.R. 3 Eq. 368, F (b) 3 Morivale 353 = 17 Revised Reports 101, F.

Hindu Wills Act.

See ACT XXI OF 1870.

Holder in due course.

(1) Bill of exchange—indorsed over by person in whose favour it was drawn to indorsee—indorsee, a holder deriving title from holder in due course—Competent to sue under S. 53, Negotiable Instruments Act See ACT XXVI OF 1881 (NEGOTIABLE INSTRUMENTS), No. 1, 10 Bom. L.R. 268.

Holder in due course—(Concluded).

(2) Whether plaintiff, to whom promissory note was merely delivered by his master for a suit to be filed on it is—of the note. See PROMISSORY NOTE, No. 1, 14 Bur. L.R. 25.

Homestead land.

(1) Tenancies of—created before the Transfer of Property Act for the purpose of limitation—Transferability. See LANDLORD AND TENANT, No. 5, 7 C.L.J. 309.

(2) Investing Munsiff with authority to exercise jurisdiction with respect to suits for recovery of rent of—up to a certain value and to try such suits under Small Cause Court Procedure, effect of See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), No. 5, 7 C.L.J. 407.

Hundi.

(1) —payable at sight—Liability of drawer where holder agrees to arrangement with acceptor for payment—Notice of dishonour, omission to give—Discharge of drawer—Negotiable Instruments Act, Ss. 30, 39 and 86 See ACT XXVI OF 1881 (NEGOTIABLE INSTRUMENTS), No. 2, 12 C.W.N. 644.

(2) Son working with father in a common business signing a *hundi* on behalf of the latter, liability of. See ACT XXVI OF 1881, No. 1-a, 2 Sind. T.R. 11.

Husband and wife.

(1) Custody of wife, not allowed when marriage is illegal See MAHOMEDAN LAW (DIVORCE), No. 1, 84 P.W.R. 1908.

(2) Husband deserting and abandoning wife—Husband not entitled to claim custody of wife. See RESTITUTION OF CONJUGAL RIGHTS, No. 2, 82 P.R. 1908.

Hyderabad

Subsidiary force in—, position of—Power of cantonment authorities as to grant of land within cantonment limits See NATIVE STATES, No. 1, 12 C.W.N. 465.

Idol.

Representation of idol by Shebait—Trespass by Shebait—Liability of idol for meane profits See RELIGIOUS ENDOWMENTS, No. 1, 12 C.W.N. 550.

Immoveable property.

—standing timber is, under S. 3, cl 25 and S. 4, General Clauses Act—S. 3, Indian Registration Act. See ACT VII OF 1885 (BENGAL), No. 24, 7 C.L.J. 152.

Impartible property.

(1) Impartibility if attaches to maintenance grants made by Raj to junior members. See *BABUANA GRANT*, No. 1, 12 C.W.N. 906.

(2)—See *HINDU LAW (IMPARTIBLE ESTATES)*.

Improvements.

(1) Charge for second crop on punja (dry) land—Absence of proof of custom—Enhancement of rent on account of tenant's improvements. See *ACT VIII OF 1865 (RENT RECOVERY, MADRAS)*, No. 5, 17 M.L.J. 518=9 M.L.T. 101.

(2) Claim to increased rent on improvements by tenants. See *ACT VIII OF 1865 (RENT RECOVERY, MADRAS)*, No. 6, 17 M.L.J. 511=3 M.L.T. 103.

Inams.

(1) *Resumption—Right of the grantee of the inam.*

Where the resumption was merely an incorporation of the inam in the public revenue, the right in the land possessed by the grantee of the inam or his successors is not extinguished. *Perumal Naidu v. Syed Mahathoom Saheb*, 4 M.L.T. 305.

MILLER AND PINHEY, JJ.

Reference:—26 M 346, F.

(2) *Village service inam land—Transfer of land, effect of—Validity of transfer—Reg. VI of 1831—Subsequent enfranchisement, effect of—Vendee and vendor.*

Whether an Inam is regarded as a grant of the land, or as a remission of the assessment payable on the land, if the land is transferred, the Inam is transferred, unless in the transfer the Inam is reserved.

A certain land, classed as village service Inam, was sold in 1889 and the Inam was enfranchised or resumed in 1891.

Held that any transfer of Inam forming the emoluments of Village Officers and Servants is, by *Reg. VI of 1831*, which was in force in 1899, null and void; for the alienation as a whole must be null and void; it is not possible to alienate the land and reserve the benefit of the right to withhold the payment of the assessment payable thereon; but, when the land was enfranchised in 1891, it became alienable and the purchaser became entitled to require that the transfer should operate on the alienable interest acquired by the seller (*a*). *Angannayya v. Daroor Narasanna*, 3 M.L.T. 243=18 M.L.J. 247.

WHITE, C.J., AND J. MILLER, J.

Reference.—(a) 30 M. 255, F.

Income Tax Act.

See *ACT II OF 1886*.

Inconsistent pleas.

Practice—Setting up,—Defence of want of genuineness of deed—Written statement to contain it or issue upon that basis—Plea of misrepresentation, undue influence or fraud not allowed subsequently. See *PLEADINGS*, No. 1, 10 Bom. L.R. 494.

Incorporation.

—if legalizes illegally constituted society. See *MAHOMEDAN LAW (WAKF)*, No. 4, 13 C.W.N. 26.

Incurable disease.

—of a Hindu, will disable him from inheriting—but disease subsequent to inheritance will not divest estate inherited. See *HINDU LAW (SUCCESSION)*, No. 1, A.W.N. (1908), 47.

Indemnity.

Contract to indemnify surety for his bail-bond—Illegal contract—Sale-deed and rent note executed as—for bail void. See *CONTRACT ACT*, No. 11, 10 Bom. L.R. 553.

India Council's Act.

See *ACTS 55 AND 56 VIC. CH. 14*.

Inheritance.

(1) Effect of forfeiture of ancestral property of a criminal, subject to Punjab Customary Law, for absconding or committing a crime, on right of inheritance of his male lineal descendants or collaterals. See *CRIM PRO CODE*, No 1, 19 P.W.R. 1908.

(2) Claim for inheritance—Death-bed attentions—Funeral expenditure—Evidentiary value.

See *EVIDENCE*, No. 4, 4 L.R.R. 291.

Injunction.

(1) *Defendants blocking up channel of Government irrigating plaintiff's lands—Plaintiff deprived of use of water of that channel—Suit for injunction—Relations between ryot and Government with reference to supply of water—Express finding as to damage, whether necessary—Burden of proof.*

The defendants, by blocking up the entrance of a small Government channel irrigating the lands of the plaintiff, deprived him of the use of the water of that channel, and the plaintiff prayed for an injunction restraining the defendants from repeating the obstruction; the defence was that, the supply of water for irrigation being made by the Government to the ryot on the footing of contract, the defendant

Injunction—(Continued).

obstructing the plaintiff's supply could be made liable, if at all, only on proof of actual damage, of which it was alleged there was no proof.

Held that the plaintiff was entitled to the injunction.

Per White, C.J. —Whether the relations between the plaintiff and Government with reference to the supply of water be regarded as contractual, or whether the plaintiff's right to the water of the channel be regarded as a proprietary right appurtenant (a) to ownership of the land, the plaintiff was entitled to the injunction without any express finding as to damage (b). Even if damage is not to be presumed in such a case, the onus lay on the defendants to show that no damage was sustained by the plaintiff.

Per Miller, J. —In order that an injunction may be issued, it is enough to show that the act complained of was done in such a way as to be likely to damage the plaintiff, though proof of specific damage be not given (c).

* The principle of relation between ryots and Government with reference to the supply of water for irrigation considered **Rama Odayan v. Subramania Aiyar**, 3 M.L.T. 273=18 M.L.J. 178=31 M. 171.

WHITE, C.J., AND MILLER, J.

References —(a) 24 M. 36; 28 M. 72 (74), *R* (b) (1898) 1 Q.B. 715; (1901) A.C. 495, 2 E. and B. 216, *R*. (c) (1896) 1 Q.B. 147, *R*.

(2) *Order for injunction without notice to opposite party, legality of*—Civ. Pro. Code, S. 494.

Held, that an order granting an injunction without notice to the opposite party and without giving any reason for adopting such a course is contrary to the express provisions of S. 494, Civ. Pro. Code. **Sanwal Singh v. Narpatt Singh**, 11 O.C. 151

CHAMLER AND EVANS, J. CS.

(3) Suit for, against order of Municipality for demolition of building on a lane—Public street. See ACT I OF 1900 (U.P. MUNICIPALITIES), No. 2, 5 A.L.J. 45.

(4) Decree for permanent—Lands purchased from decree-holder by another person—Vendee bringing a fresh suit for. See CIV. PRO. CODE, No. 134, 10 Bom. L.R. 18.

(5) to restrain tenants from offering obstructions to the cutting down and removal, by land-

Injunction—(Concluded).

lord, of trees upon their holding, impropriety of granting. See **LANDLORD AND TENANT**, No. 1, 5 A.L.J. 99.

(6) Suit for, against official—Notice of suit—Necessity. See COURT OF WARDS, No. 1, 12 C.W.N. 1865.

(7) Suit for injunction—Whether notice of action necessary under S. 156 (1) of Local Boards Act—Limitation. See ACT V OF 1884 (LOCAL BOARDS), No. 2, 4 M.L.T. 209.

(8) Temporary—Injunction to a person not to proceed with his suit in the Small Causes Court at Bombay—Jurisdiction of High Court of Bombay—See JURISDICTION (OF HIGH COURT), No. 2, 10 Bom. L.R. 1141.

(9) Effect of delay on claim to mandatory injunction—Damages awarded where injunction is refused. See EASEMENT, No. 1, 12 C.W.N. 519.

(10) Civ. Pro. Code, S. 493—Disobedience of—Not amounting to an offence under S. 188, I.P.C.—Sanction to prosecute defendant under S. 195, Crim. Pro. Code—Object of S. 493. See CIV. PRO. CODE, No. 264 (a), 14 Bur. L.R. 276.

Insolvency.

(1)—proceeding—*Ex parte* order, setting aside of—Review. See CIV. PRO. CODE, No. 96, 7 C.L.J. 268.

(2) Official Assignee—Disallowance of claim of Official Assignee to have proceeds of sale in execution of decree against insolvent judgment-debtor paid to him—Appeal—See CIV. PRO. CODE, No. 146, A.W.N. (1908), 203

(3) Appeal against order by Subordinate Judge in Insolvency proceedings. See CIV. PRO. CODE, No. 340, 4 M.L.T. 455.

(4) Jurisdiction of Appellate Court—Omission of Insolvency Commissioner to consider important documentary evidence—Remand. See **VAKIL**, No. 1, 18 M.L.J. 565

(5) Omission to frame schedule—Creditor not barred from suing for debt. See CIV. PRO. CODE, No. 223, 64 P.R. (1907)=89 P.L.R. 1908.

(6) Crops of insolvent debtor attached by decree-holder—Claim to crops allowed—Right of suit by decree-holder—Whether Official Assignee a necessary party. See CIV. PRO. CODE, No. 192, 4 M.L.T. 197

(7) Insolvent's Estate's Court constituted under the Punjab Laws Act has no jurisdiction to dispose of application under S. 344, C.P.C. See CIV. PRO. CODE, No. 222-a, 161 P.W.R. 1908.

Insolvency Act (XI & XII, Vic. C. 21).

- (1) *S. 5—Insolvent Debtor's Court at Bombay—Jurisdiction—"Reside"—A person residing at Shanghai cannot apply for insolvency to the Bombay Court.*

A person residing at Shanghai and carrying on business in partnership in Bombay cannot present his petition to the Insolvent Debtor's Court at Bombay to have the benefit of the Act (a). *Re Manekji Pestonji Talati*, 10 Bom. L.R. 84.

RUSSELL, J.

References:—(a) (1867) 2 Ind. Jur. N.S. 326 and 21 B. 405, *relied on*, 11 B.L.R. 254; (1880) 15 Ch. D. 484, (1882) 22 Q.B.D. 1; (1901) A.G. 102; (1878) L.R. 8 Ch. 374; (1879) 12 Ch. D. 522, (1892) 2 Q.B. 268, *referred to*.

- (2) *S. 7 (11 and 12, Vic. C. 21)—Execution-sale of judgment-debtor's undivided share in ancestral property—Insolvency of judgment-debtor prior to execution-sale—Suit for partition by the assignee from purchaser in execution.*

In the execution of a simple money decree against the judgment-debtor, a member of a joint Hindu family, his undivided share in the ancestral immoveable property was sold and the purchaser conveyed his right to the plaintiff. Prior to the execution-sale the judgment-debtor had become an insolvent and all his property had vested in the Official Assignee under S. 7, Insolvency Act. On the plaintiff bringing a suit for partition and possession of the share, *held*, that as soon as an order had been made under S. 7, Insolvency Act, vesting property of a judgment-debtor in the Official Assignee, the judgment-debtor had no saleable interest in such property, and that as such, the plaintiff's suit could not be maintained. *Sundrappayar v. Rama, Aru. Aru, Rama Arunachella Chettiar*, 4 M.L.T. 188 = 13 M.L.J. 487.

MUNRO AND SANKARAN NAIR, JJ.

*References:—*11 C.L.R. 389; 3 B. 437, *R*; 30 M. 145, *Not F*.

- (2-a) *S. 9—Procedure—Adjudication of insolvency, application for—By petition or by a rule—Rule obtained per incuriam.*

The usual procedure for obtaining an adjudication order is by petition to the Court duly verified under S. 9 of the Indian Insolvency Act (XI and XII, Vic. C. 21) and not by a rule. *In the matter of, Bithal Dass Kalla*, 12 C.W.N. 538.

FLETCHER, J.

Insolvency Act (XI & XII, Vic. C. 21)—(Old.).

- (3) *S. 27—Commissions on policies of insurance are assets—Salary—Emolument.*

The commission earned by an insolvent in respect of policies of insurance effected through his instrumentality is an asset and not a 'salary' or an 'emolument' under S. 27 of the Indian Insolvent Act. Such commission is not his personal earning. *Jamasji Shapurji Lala v. Sorabji Kawsaji Bapasola*, 10 Bom. L.R. 579.

RUSSELL, J.

- (4) *Ss. 27 and 26—Jurisdiction of the Insolvent Court outside the Bombay Presidency—Person in possession of insolvent's property can be directed to hand it over to the Official Assignee.*

The Court for the relief of Insolvent debtors sitting in Bombay has jurisdiction to make an order under S. 26 of the Indian Insolvent Act against a person residing outside the Bombay Presidency. *In re Ganeshdas Panalal. R.D. Sethna v. R. S. D. Chopra*, 10 Bom. L.R. 77 = 32 B. 198.

JENKINS, C.J. AND BATCHELOR, J.

- (5) *S. 36—Application by creditor of an insolvent for examination of certain persons under—Probability of benefit resulting, should be shown—Application to be preferred without delay.*

When a creditor makes an application for the examination of a person, under S. 36 of the Insolvency Act (11 and 12, Vic. C. 21), the Court must be satisfied that there is a probability of some benefit resulting from such examination. It should not be vague. It is most expedient that such application should be preferred without delay. *In the matter of Noor Mahomed Abdool Succoor*, 14 Bur. L.R. 175.

LIRWIN, C.J., AND ORMOND, J.

- (6) *S. 49—'May,' construction of—Stay of further proceedings after the filing of the insolvent's schedule.*

S. 49 of the Indian Insolvent Act empowers the Insolvent Court to deal with (1) cases in which a decree has been passed; and (2) cases in which a suit has been instituted but a decree has not been passed. In the former case the Court may stay the execution; in the latter it may stay further proceedings in the suit.

The word 'may' in the section indicates that the requisite conditions which the section lays

Insolvency Act (XI & XII, Yic. C. 21).—(Old.).

down being fulfilled,*the Court will and ought to exercise the power it may exercise. The word 'may' does not vest the Court with a discretion which it can uniformly exercise in one case and renounce in the other. What discretion there is, is meant to be used in exceptional cases. *Hookamchand Sarupchand v. Nowroji Sorabji Talati*, 10 Bom. L.R. 345.

BEAMAN, J.

Insolvency Act (St. 11 and 12, Yic. C. 40).

- (1) *S. 7—Insolvent—Vesting order—Official Assignee—Withdrawal of the petition for insolvency—Right of Official Assignee to maintain a suit.*

On the 14th October, 1903, a petition in insolvency was filed and a vesting order was made by the Court. On the 15th June, 1904, the insolvents took out a rule nisi to withdraw their petition; and the rule was made absolute on the 21st September, 1904. But the rules were not drawn up till 27th February, 1906. In the meanwhile, the Official Assignee filed a suit on the 2nd March, 1905, on behalf of the insolvents, to recover a sum of money alleged to be due to the insolvent's firm in respect of certain mercantile transactions. It was objected that the Official Assignee was not entitled to maintain the suit:—

Held that, at the date of the institution of the suit, the insolvency proceedings were still in force; and the assets of the insolvents still remained vested in the Official Assignee. The subsequent coming into force of the order could not vitiate (a) the institution of the suit, and it was clear that the Official Assignee was competent to bring the suit. He was also competent to continue it, for the order of withdrawal, even after it became operative, was not effective to divest the Official Assignee and re-vest the property in the insolvents.

The withdrawal of a petition for insolvency does not operate to discharge the vesting order. A withdrawal for which no provision is made in the Act cannot be regarded as the legal equivalent of a dismissal by consent. *Haji Sajan Lalji v. N.C. Macleod*, 10 Bom. L.R. 178=32 B. 321.

JENKINS, C.J. AND BATCHELOR, J.

Reference:—(a) (1845) 8 Beav. 364, R.

Insolvency Act (St. 11 and 12 Yic. C. 42).

- (1) *Ss. 7, 26—Insolvent's property at Shanghai—Order vesting the property in the Official Assignee at Bombay—A British*

Insolvency Act (St. 11 and 12 Yic. C. 42)—(Concluded).

subject in possession can be ordered to deliver the property to the Official Assignee—Commission to examine witness at Shanghai.

When a trading firm is declared insolvent by the Court for the relief of Insolvent Debtors at Bombay, it can order the moveable property of the firm in Shanghai to be vested in the Official Assignee of the Insolvent Debtor's Court in Bombay and the Court can order the person in possession of the property at Shanghai to hand-over such property to the Official Assignee, Bombay.

If the person in possession at Shanghai is a British subject, he is subject to the Insolvency jurisdiction of the Consulate Court at Shanghai; and that Court can order him, if requested so to do by the Insolvent Court of Bombay, to produce all the moveable property, books, papers and documents of the insolvent's firm that may be in his possession.

A Commission can be issued by the Court for the relief of Insolvent Debtors at Bombay for the examination of a British subject at Shanghai through H.B.M.'s Supreme Court at Shanghai. *In re, Naoroji Sorabji Talati*, 10 Bom. L.R. 965.

RUSSELL, J.

Inspection of Steam Boilers Act

—See ACT III OF 1879.

Instalment bond.

- (1) *Whole amount payable upon failure to pay any instalment—Suit to recover balance—Instalments paid irregularly—Waiver—Interest from date of decree.*

A bond payable by instalments provided that, on failure to pay any instalment, the obligee would be entitled to get the whole amount of the bond together with interest at 12 per cent. per mensem from the date of the bond. Some of the instalments were paid though irregularly and accepted. There was default again. In a suit to recover the balance due upon the bond with interest. *Held*, that the plaintiff was entitled to recover the amount sued for with interest from the date of the decree (a), *Ramdhani Sahu v. Lalit Singh*, 5 A.L.J. 609. =A.W.N. (1908), 255.

STANLEY, C.J., AND BANERJI, J.

Reference:—(a) 28 A. 622, D.

Instalment bond—(Concluded).

(2)—not so worded as to compel creditor to sue for the whole amount at once on first default—Option. See *LIMITATION ACT*, No. 62, 5 A.L.J. 72.

(3)—executed by some of the judgment debtors in decree-holder's favour in respect of decretal amount—Whether it is a mere agreement to give time within meaning of S. 257-A, C.P.C.—Whether such bond will prevent decree-holder from suing upon it, as illegal. See *CIV. PRO. CODE*, No. 167, 12 C.W.N. 674.

Instalment decree.**(1) Default in payment of instalment—Rights of decree-holder—Waiver—Limitation.**

No distinction can be drawn between a case in which it is provided that, on non-payment of an instalment, the whole amount *shall* become due, and one in which it is provided that, on non-payment of an instalment, the whole amount *may* be claimed. The provision being for the benefit of the creditor, the presumption is that he does not waive it, and the defendant may well consider the whole amount to be due from the time that the creditor has a right to enforce it (a).

Where it is clear from the terms of the decree that the decree-holder had, on default being made, a right either to enforce payment of the whole amount, or to issue execution for the one instalment only, and he actually applies for executing the decree for the full amount, he thereby does an unequivocal act, to the knowledge of the defendant, showing which of the two inconsistent alternatives open to him he adopts, and his election is final. And the mere fact that he subsequently agreed not to enforce payment of the whole amount would not amount to revocation of his election.

An execution application made after three years from the date of such default or election will be barred. **Jethanand Topandas v. Lalamal Sitalmal**, 1 S.L.R. 252.

KNIGHT AND CROUCH, A.J. CS.

References—(a) 31 C. 297 (306); 24 C. 281, R.

Interest.**(1) Exorbitant rate of interest, whether penalty.**

A large and apparently exorbitant rate of interest is not necessarily a penalty. **Narayana Pillay v. Muthusawmy Teyan**, 4 M.L.T. 87.

BODDAM AND MUNRO, JJ.

Reference.—25 M. 343, F.

Interest—(Continued).**(2) Agreement to pay, express or implied—Interference by Court, whether allowable—S. 2, Act XXVIII of 1855.**

When a certain rate of interest is agreed upon by the parties either by express or implied agreement, the Courts have no power to interfere with such rate and are bound to allow the rate as agreed upon, if the contract is not otherwise invalid. There is absolutely no discretion in the matter, as is clear from S. 2, Act XXVIII of 1855. **Raghu Mal v. Bandu**, 110 P.R. 1908.

RATTIGAN AND LAL CHAND, JJ.

References—36 P.R. 1894; 3 A. 260; 96 P.R. 1901; 29 C. 823, *relied on*, 110 P.R. 1879; 55 P.R. 1901; A.W.N. (1903), 44, R.

(3)—as forming part of mesne profits or damages—Period limited by S. 211, C.P.C.—Rate of interest. See *CIV. PRO. CODE*, No. 112, 12 C.W.N. 285.

(4) Decree, directing payment of mortgage money and costs, with future interest up to date fixed for payment, entitles decree holder to interest until realisation. See *MORTGAGE (DECREE)*, No. 1, 10 Bom. L.R. 144.

(5) Plaintiff not a Hindu—Absence of mercantile usage—No written instrument—No demand in writing—Right to interest. See *ACT XXXII OF 1839 (INTEREST)*, No. 2, 1 Sind L.R. 179

(6) Compound interest on money awarded to vendee—Whether allowable under S. 15 of the Punjab Laws Act. See *ACT IV OF 1872 (PUNJAB LAWS)*, No. 2, 109 P.L.R. 1908.

(7)—does not become principal. See *TRANSFER OF PROPERTY ACT*, No. 28, 4 N.L.R. 86.

(8) Compound interest—Interest at enhanced rate on default, when penal—Contract Act, S. 74. See *PENALTY*, No. 1, 11 O.C. 307.

(9) Suit by prior mortgagee—*Puisne* mortgagee not made party—Suit for redemption by the latter—Conditions of redemption—Contract rate of interest. See *MORTGAGE SUIT*, No. 1, 18 M.L.J. 344.

(10) Creditor dying leaving will but without executors—Running of interest—Stopped—Common law—Where payable under contract—Where as damages—Attachment of debt—Running of interest—not stopped. See *CONTRACT ACT*, No. 1, 4 M.L.T. 335.

Interest—(Concluded).

(11) Rules for the calculation of interest in suit for redemption. See MORTGAGE (REDEMPTION), No. 28, 4 N.L.R. 168.

(12) Interest on cesses due from babuana property. See BABUANA GRANT, No. 3, 13 C.W.N. 118.

(13) Agreement to pay, when amounts to penalty. See CONTRACT ACT, No. 28 (a), 4 N.L.R. 187.

(14) Mortgage with possession—Failure of mortgagee to keep accounts—Interest and profits realised by mortgagee balancing each other. See CIV. PRO. CODE, No. 9, 95 P.L.R. 1908.

(15)—, rate of, to be awarded to mortgagee after decree directing sale of mortgage property. See TRANSFER OF PROPERTY ACT, No. 55, 3 M.L.T. 281.

(16) Principal paid after accrual of interest—Right to interest. See DAMDUPAT, No. 1, 2 Sind L.R. 10.

Interest Act.

—See ACT XXXI OF 1839.

Interlocutory application

—in suit—Order against lessee from Receiver for arrears of rent or interest cannot be made in such application—Claims against Receiver for giving up arrears of rent or interest due under lease granted by him cannot be dealt with also. See RECEIVER, No. 2, 12 C.W.N. 1023.

Interlocutory order.

—, revision of. See CIV. PRO. CODE, No. 265-a, 2 Sind L.R. 22

Interpleader Suit.

(1) *Practices—Interpleader—Suit to redeem mortgage against two parties claiming mortgage-money—Appropriate relief.*

When a mortgagor was about to pay off the mortgage-amount to an assignee of the mortgage, the mortgagee disputed the assignment and also claimed to be paid the mortgage-amount. The mortgagor thereupon filed a suit impleading both the mortgagee and the assignee as defendants. The plaint contained, in substance, a claim for redemption, but it also prayed that the defendants should be required to interplead concerning their claims to the mortgage-amount, and that the mortgagor should be indemnified in consequence of the loss of the original mortgage deed. Prior to the hearing the defendants agreed that the assignee was

Interpleader Suit—(Concluded).

entitled to receive the mortgage amount. The suit was dismissed as not being maintainable as an interpleader suit, *inter alia*, because plaintiff claimed an indemnity and consequently had an interest. On appeal.

held, that it was erroneous to treat the suit as only one of interpleader. Inasmuch as the plaint also contained in substance a claim for redemption, that was the appropriate relief, in the circumstances (a). **Jaggannath Harilal v. Tulka Kera**, 10 Bom. L.R. 314.

SIR LAWRENCE JENKINS, K.C.I.E., AND
BATCHELOR, C.J. AND J.

Reference .—(a) 4 De. G. and F. 183, F.

(2) See CONTRACT ACT, No. 1, 2 M.L.T. 335.

Interrogatory.

Failure of defendant to answer—effect of—
See CIV. PRO. CODE, No. 99, 7 C.L.J. 295.

Inventions and Designs Act.

—See ACT V OF 1888.

Irregularity.

(1) Plea of limitation not taken below—Decreasing claim barred by limitation—Whether material irregularity committed. See LIMITATION ACT, No. 2, 27 P.R. 1908.

(2)—Proceeding of Munsiff on Sunday only and, —cured by consent of parties. See PRACTICE, No. 3, 5 A.L.J. 106.

(3) Material—under S. 70 (a) of Act XVIII of 1884 when committed. See ACT XVIII OF 1884 (PUNJAB COURTS), No. 6, 143 P.W.R. 1908.

Jains.

Widow's power to adopt according to law and custom of—Without special authority—Right of senior widow to adopt without concurrence of junior—Right of widow to give son in adoption after husband's death—Adoption of married man whether legal. See HINDU LAW (ADOPTION), No. 3, A.W.N. (1908), 79.

Jhansi Encumbered Estates Act,

—See ACT XVI OF 1882 (N.W.P.).

Joinder of causes of action.

Suit for possession by auction-purchaser—Suit dismissed—Suit by him again as mortgagee for sale—Relief for sale could not be joined in first suit for possession. See CIV. PRO. CODE, No. 32, 5 A.L.J. 729.

Joinder of parties.

(1) Suit for sale on mortgage—Whether person having interest adverse to claims of mortgagor

Joinder of parties—(Concluded).

and mortgagee should be joined as defendant. See **TRANSFER OF PROPERTY ACT**, No. 45, A.W.N. (1908), 100.

(2) Suit to appoint trustee and to recover trust properties—Stranger to trust—Widow and heir of trustee, whether can be joined as party. See **TRUSTS**, No. 3, 4 L.B.R. 183.

(3) Suit by sub-mortgagee for sale of mortgaged property—Mortgagor must be impleaded as also the mortgagees in such suit—Opportunity to mortgagor to redeem and to mortgagees to safeguard their interests. See **MORTGAGE (GENERAL)**, No. 10, 5 A.L.J. 402.

(4) Mortgage suit—Parties—Omission to join all the heirs of a purchaser of mortgaged property within time—Suit not to be dismissed for defect of parties unless plaintiff was aware, at suit date, of their interest in mortgaged property—Proper procedure. See **TRANSFER OF PROPERTY ACT**, No. 46, 12 C.W.N. 911.

(5) Defendant objecting to non-joinder of parties after suit was barred by limitation—Plaintiff getting names added after limitation period—Suit not barred by limitation. See **LIMITATION**, No. 12, 5 A.L.J. 554.

(6)—See **MISJOINDER**.

(7)—See **PARTIES**.

Joint property.

(1) Effect of certain property acquiring character of joint property under Hindu Law. See **HINDU LAW (JOINT FAMILY)**, No. 2/3, 10 Bom. L.R. 175.

(2) For an elaborate analysis of the Hindu Law notions of joint property, joint family property and joint ancestral family property, and for the distinction between them on the one hand and between them and the corresponding notions under English Law on the other, and for the legal incidents thereof. See **HINDU LAW (JOINT FAMILY)**, No. 4, 10 Bom. L.R. 184.

Joint-tenants.

Alienees not joint-tenants where their shares are definitely specified. See **OCCUPANCY RIGHTS**, No. 2, 100 P.R. 1908.

Judge.

(1) Duty of Divisional—is to follow, not criticise, the rulings of his Chief Court. See **GIFT**, No. 1, 14 Bur. L.R. 30.

(2) Duty of a—of law and fact. See **LIBEL**, No. 1, 12 C.W.N. 490.

Judge—(Concluded).

(3)—receiving private communications regarding a pending suit and acting upon them—Propriety. See **RES JUDICATA**, No. 1, 116 P.W.R. 1908.

(4)—exercising judicial functions is Civil Court within Limitation Act and not officer of Government acting in his official capacity within Art. 14, Limitation Act. See **LIMITATION ACT**, No. 47, 10 Bom. L.R. 749.

(5)—See **COURT**.

Judgments.

(1)—not *inter partes*, admissibility of. See **EVIDENCE ACT**, No. 6, 7 C.L.J. 90.

(2) Time for dating and signing judgment—Right of parties to compromise both before and after judgment is delivered. See **COMPROMISE**, No. 1, 67 P.W.R. 1908.

(3)—written after Judge was transferred, validity of. See **CIV. PRO. CODE**, No. 107, 12 C.W.N. 682.

(4)—based on erroneous assumption—power of Court to re-open portion affected by error. See **PRACTICE**, No. 1, 10 Bom. L.R. 531.

(5) Loss of judgment—Judge competent to re-write it from memory. See **CIV. PRO. CODE**, No. 244, 8 C.L.J. 521.

(6) Order of remand if judgment. See **CHARTER ACT**, No. 1, 13 C.W.N. 105.

(7) Wrong words used in judgment through inadvertence, in describing suit property—Corrections may be made on application under S. 202, Civ. Pro. Code—Review unnecessary. See **CIV. PRO. CODE**, No. 108, 40 P.L.R. 1908.

Judgment-debtor.

(1) Who had not taken advantage of the **Bundlekhand Encumbered Estates Act**, but against whom decree-holder had not made any claim after notification, not liable to more than his proportionate share of the judgment debt. See **ACT I OF 1903 (N.-W.P.)**, No. 1, A.W.N. (1908), 43.

(2) Transferee of decree who might happen to be one of the judgment-debtors—S. 292, cl. (b) not intended to deprive him of all relief—Imposition of appropriate procedure—suit for contribution. See **CIV. PRO. CODE**, No. 127, 10 Bom. L.R. 89.

Judicial Commissioner, Sind.

Jurisdiction of, in suits for breach of contract. See **JURISDICTION OF CIVIL COURTS**, No. 5, 2 Sind L.R. 37.

Jurisdiction.

- (1) GENERAL.
- (2) OF CIVIL COURTS.
- (3) OF CIVIL AND REVENUE COURTS.
- (4) OF CRIMINAL COURTS
- (5) OF HIGH COURTS.
- (6) OF SMALL CAUSE COURTS.

—1.—(General).

- (1) *Appeal—Valuation—Declaratory suit by objector against decree-holder and judgment-debtor—Valuation of suit for purposes of jurisdiction and course of appeal—Civ. Pro. Code, Ss. 278, 283 and 617—Act XVIII, 1884, S. 39.*

Defendant, decree-holder, in execution of his decree against the judgment-debtor attached half of a certain house. Plaintiff, not a party to the decree, sued both the decree-holder and the judgment-debtor for a declaration, having first objected unsuccessfully under S. 278, Civ. Pro. Code, that the property belonged to him and not to the judgment-debtor and so was not liable to attachment. The property was worth Rs. 660, but the decree in execution of which it was attached was for Rs. 41-4-0 only. The judgment-debtor sided with the decree-holder and denied the plaintiff's claim to the property, claiming it as his own.

Held, by the Full Bench, that the value of the suit for purposes of jurisdiction and course of appeal is to be taken at Rs. 660, the value of the property attached, and not Rs. 41-4-0, the amount of the decree, and hence an appeal lay to the Divisional Judge and not to the District Judge.

Obiter. Per JOHNSTONE, J.—There are three possible classes of suits under S. 283, Civ. Pro. Code.

(a) When property attached has been released on objection, suit by decree-holder for a declaration that the property is liable to attachment.

(b) When property attached has not been released, the objection being disallowed, suit by the objector against the decree-holder to declare the property not liable, the judgment-debtor siding with the objector, and not claiming the property as his own.

(c) When property attached has not been released, the objection being disallowed, suit by the objector against the decree-holder to declare the property not liable, the judgment-debtor resisting the suit and claiming the pro-

Jurisdiction—(Continued).**—1.—(General)—(Continued).**

perty as his own, and the plaintiff asserting that this is judgment-debtor's attitude.

In class (a) the value for purposes of jurisdiction is the decretal amount.

(b)

(c) .. Value of property (a).

Sher Ali Shah v. Lachman Das, 74 P.W.R. 1908 (F.B.) = 94 P.R. 1908 (F.B.)

SIR WILLIAM CLARK, C.J., CHATTERJI AND JOHNSTONE, JJ.

References:—(a) 121 P.R. 1890; 55 P.R. 1906; 142 P.R. 1906 and 15 C. 104, *approved and distinguished*; 17 A. 69, *followed*; and 2 A. 799, *criticised*.

- (2) *Local, consent cannot confer, may be raised in appeal—Code of Civil Procedure (Act XIV of 1882), Ss. 16-A, 17 and 57—Procedure, when Court's jurisdiction is doubtful—Plaint, return of, when proper.*

If a Court of appeal decides that the original Court had no jurisdiction to entertain the suit, the right course to adopt is to return the plaint for presentation to the proper Court (a).

Consent of parties cannot confer jurisdiction upon a Court, where it has not inherent jurisdiction over the subject-matter of the litigation, and the judgment of a Court which lacks this essential jurisdiction, is totally void and this would not be cured by waiver or acquiescence (b).

Where, however, the defect is not apparent on the face of the proceedings, where specially the question of jurisdiction depends upon a fact the existence of which is alleged by one of the parties in the Court of first instance and not controverted by the other, it is not obligatory upon a superior Court to enter into the question, specially where, in order to adjudicate upon the question satisfactorily, a further investigation of the facts would be essential (c).

If the want of jurisdiction appeared on the face of the pleadings or the admission of the parties or upon the evidence, the question could not only be raised in appeal for the first time, but it would be the duty of the Court to entertain it (d).

When an objection as to jurisdiction is taken for the first time before the Appellate Court, and it becomes at least one upon which there is reasonable ground for uncertainty, the Court

Jurisdiction—(Continued).**—1.—(General)—(Continued).**

should proceed under sub-section 2 of S. 16-A of the Civil Procedure Code and refuse to allow the objection to be taken at the appellate stage (e). **Abdullah Sarkar v. Asaraf Ali Mandal**, 7 C.L.J. 152.

STEPHEN AND MOOKERJEE, JJ.

References.—(a) 13 W.R. 358, 1 B. 538, R. (b) 13 I.A. 134=9 A. 191; 14 I.A. 160=11 M. 26; 2 C.L.J. 384; 5 C.L.J. 611, R. (c) 3 E. and B. 695 (701); 1 Q.B. 552 (562); 3 B.L.R. 283, R. (d) 25 C. 146, R. (e) 24 C. 449, R.

(3) *Determination of jurisdiction by plaintiff and plaintiff's allegations—Defendant's plea immaterial—Punjab Tenancy Act, Ss. 77 (3) and 100.*

Ordinarily, the jurisdiction is determined by the plaintiff and the allegations of plaintiff, and, in this connection, the defendant's pleas are immaterial. So, where plaintiff sues for the value of trees cut by defendant, on land alleged to belong to plaintiff and with which the defendant has no concern, but the defendant pleaded that he was an occupancy tenant of the land and so was entitled to the trees cut, *held*, that the suit was one for a Civil Court. Although the question of occupancy rights cannot properly be determined by a Civil Court, still, the rule above mentioned for determining jurisdiction should not be departed from; and the Civil Court should simply ignore the defendant's plea, which under the law it cannot take cognizance of, leaving the defendant to sue in a Revenue Court separately for establishment of his alleged status. **Fakiria v. Dhani Nath**, 24 P.R. 1907=26 P.L.R. 1908=131 P.W.R.1907.

JOHNSTONE AND SHAH DIN, JJ.

References.—96 P.R. 1894, 11 P.R. 1895, R.

(4) *Typpern Raj—Immoveable property in India, succession to—Jurisdiction of Court to decide—Foreign sovereign—Act of state—Appointment of Jubraj or immediate successor, contrary to alleged kulachar—Confirmation by British Government—Suit for declaration—Right of suit—Contingent interest—Specific Relief Act (I of 1877), S. 42—Discretion—Negative declaration.*

Per Curiam—The Courts in British India have no jurisdiction to decide the question as to who is entitled to succeed to the Raja of a foreign sovereign State.

Jurisdiction—(Continued).**—1.—(General)—(Continued).**

Where a suit was brought ostensibly for a declaration in regard to rights to immoveable property within British territory belonging to a foreign sovereign but with the real object of setting aside the appointment by such sovereign of his son as his immediate successor,

Held, that the Court had no jurisdiction to go into the question of the validity of such appointment.

A person cannot sue for a declaration of his right unless he has an existing right, and a mere contingent right which may never ripen into an actual existing right is not sufficient to ground an action for such a declaration

A negative declaration that the defendant had no right on the ground amongst others that the defendant was illegitimate was, in the Court's discretion, refused, specially as the Raja who was deeply interested in the question was not made a party, the suit having been instituted against the son (a).

Per Doss, J.—When the question is one of succession to immoveable property on the demise of the owner, the fact that such owner is a foreign sovereign does not deprive the Court of its jurisdiction to decide the question; nor, in deciding such question, is the Court bound merely to register the decree of the foreign sovereign, however opposed it may be to the law of the land.

An act of state of the foreign sovereign has no operation beyond his own territory.

Quære.—Whether the State in the exercise of its executive functions can settle a question of disputed succession to land forming part of its territory and thereby oust Municipal Courts of their jurisdiction to decide it, without encroaching upon its legislative functions or derogating from its legislative powers. **Shamarendra Chandra Deb Barman v. Birendra Kishore Deb Barman**, 12 C.W.N. 777=8 C.L.J. 1=4 M.L.T. 27=35 C. 777.

MACLEAN, C.J., RAMPINI, BRETT, MITRA AND DOSS, JJ.

References:—(a) 12 M.I.A. 523, R; 9 C. 535, F.

(5) *Jurisdiction, question of, when entertainable in appeal—Civil Court's jurisdiction when ousted—Central Provinces Land Revenue Act (XVIII of 1881), Ss. 4 (8a), 152—Gochur and common lands—Gaentia,*

Jurisdiction—(Continued).**—1.—(General)—(Continued).**

a proprietor—Ejectment, suit for—Court to inquire rights at the time of the filing of plaint—Entry in settlement record, presumption, evidence—Central Provinces Tenancy Act (XI of 1898), S. 2 (10)—Holding of a survey number.

If the question of jurisdiction depends for its determination upon facts not found by the lower Courts, an appellant cannot ask the High Court to find them; the appellant must substantiate his contention if he can, on the facts already found. If he is unable to point to any facts in respect of his plea, that plea must fail.

The ordinary Civil Courts cannot be ousted of their jurisdiction in the absence of an express provision of law to that effect (a).

Gochur lands cannot be classed in the same category as common lands.

A *gaontia* of a Government village in the Sambalpur District is a proprietor and is entitled to bring an action in ejectment.

The Civil Courts must adjudicate on the rights of the parties as they existed when the plaint was filed and not on any title subsequently derived (b).

The entry in the settlement record is not conclusive; it is only a matter of presumption.

The holding of a survey number in section 2 (10), explanation II of the Central Provinces Tenancy Act has reference to the holding when the proceedings in a Civil Court are initiated, and it cannot avail a person that in a subsequent settlement he was recorded as a tenant. **Purkhit Panda v. Ananda Gaontia**, 8 C L.J. 116 = 12 C.W.N. 1036.

CASPERSZ AND SHARFUDDIN, JJ.

References:—(a) 10 C.P.L.R. 17, R. (b) 21 M. 288, R.

(6) Cancellation of mortgage—Permanent lease of mortgaged lands in favour of mortgagee—Mortgagee's failure to perform his part of the contract—Jurisdiction. See MORTGAGE (GENERAL), No. 3, 11 O.C. 89.

(7) Jurisdiction of Court to pass decree for pre-emption when the sum payable exceeds the Court's pecuniary jurisdiction. See VALUATION OF SUIT, No. 1, 46 P.R. 1908.

Jurisdiction—(Continued).**—1.—(General)—(Concluded).**

(8) Plaintiff resident of Lahore—Defendant resident of Cochin—Plaintiff paying advance as part of the price for goods to be sent by defendant—Balance to be paid by bill drawn by defendant on plaintiff at Lahore—Failure to send goods—Suit for recovery of advance and damages—Court at Lahore, whether has jurisdiction. See CIV. PRO. CODE, No. 40, 36 P.R. 1908.

(9)—, appellate, cannot be created but by express language in an enactment. See CIV. PRO. CODE, No. 89, 10 O.C. 353.

(10) Suit before Munsiff for possession of house valued by plaintiff at Rs. 90—Decree on payment to defendant of Rs. 634 and odd, value of improvements effected—Jurisdiction of District Judge to entertain appeal—Valuation of suit for purposes of Court fee and jurisdiction, whether same or different. See COURT FEES ACT, No. 7, 19 P.R. 1908.

(11)—of Port authorities at Karachi to order vessel in Port to leave it immediately, See ACT X OF 1889 (PORTS), No. 1, 1 Sind L.R. 201.

(12) Questions relating to—Whether can be waived—Right to raise such question in second appeal. See CIV. PRO. CODE, No. 290, 1 Sind L.R. 155.

(13) Meaning of "inherent jurisdiction" of Courts. See JURISDICTION OF CIVIL COURTS, No. 5, 2 Sind L.R. 37.

(14) Misjoinder of parties—Civ. Pro Code, Ss. 16 and 19—Suit by heir to recover property from co-heir and transferees from him—Property situate in different districts—Compromise of part of claim—Multifariousness. See CIV. PRO. CODE, No. 38, A.W.N. (1908), 235.

(15) Questions of title between Government and claimant cannot be tried by Collector acting under the Land Acquisition Act. See ACT I OF 1894 (LAND ACQUISITION), No. 15, 10 Bom. L.R. 994.

(16) Act conferring jurisdiction—Implied authority for means to carry out the Act. See CIV. PRO. CODE, No. 265-a, 2 Sind L.R. 22.

—2.—(Of Civil Courts).

(1) Order returning plaint for presentation to proper Court—Submission to the order—Right of appeal, effect on.

Jurisdiction—(Continued).

—2.—(Of Civil Courts)—(Continued).

Where a plaint was returned for presentation to the proper Court having jurisdiction and the plaintiff submitted to the order and presented the plaint to such Court, *held*, that it was not now open to him to appeal from the order returning the plaint. **Saraj Kunwar v. Sardar Karam Singh**, 11 O.C. 98.

EVANS, A.J.C.

Reference: —11 C.W.N. 765, F.

- (2) *Appeal—By one of several unsuccessful defendants—Want of jurisdiction in Appellate Court to decree claim against successful defendant in absence of appeal by plaintiff—Costs.*

Held, that, where the first Court has decreed plaintiff's claim only against one or more of several defendants, the Appellate Court, simply on appeal by the unsuccessful defendant or defendants, and without a cross appeal on behalf of plaintiff, has no jurisdiction to disturb that portion of the first Court's decree which is in favour of the successful defendant or defendants (a).

Held, also, that a Court has no jurisdiction to award cost of one successful defendant against another unsuccessful defendant in plaintiff's claim, **Jowahir Singh v. Amin Chand**, 57 P.W.R. 1908.

KENSINGTON, J.

Reference: —(a) 46 P.R. 1892, F.

- (3)—*Plaintiff praying for payment of money—Decree for possession given by Munsiff—Power of District Judge—S. 42, Specific Relief Act.*

Where a plaintiff asked for the only relief to which he was entitled, *viz.*, payment to him of the sums retained by the defendant in breach of the agreement, and the Munsiff gave him a decree for possession for which he did not ask, it was held that the District Judge in appeal was wrong in holding that the suit did not lie as the plaintiff was bound to ask for possession as a consequential relief under S. 42, Specific Relief Act **Kollipara Subbayya v. Kollipara Pitchayya**, 3 M.L.T. 309.

WHITE, C.J., AND WALLIS, J.

- (4) *Claim for pre-emption of revenue paying land—Competency of Court to entertain it with regard to its value of thirty times the jama—Its incompetency to decree possession*

Jurisdiction—(Continued).

—2.—(Of Civil Courts)—(Continued).

on payment of a sum exceeding its pecuniary jurisdiction—Return of plaint.

Held, by the Full Bench, that although a suit for possession of revenue paying land on the ground of pre-emption can be entertained by a Court having jurisdiction with regard to the value of the land calculated at thirty times the *jama*, it has no power to decree the claim on payment of a sum in excess of the limits of its pecuniary jurisdiction. **Mahomed Afzal Khan v. Nand Lal**, 73 P.W.R. 1907 (F.B.) = 16 P.R. 1908 = 146 P.L.R. 1908.

REID, RATFIGNAN AND LAL CHAND, JJ.

References.—Civil appeal 427 of 1907; 29 P.R. 1893, civil appeal 672 of 1901, *overruled*; 16 P.W.R. 1907, F.; 58 P.R. 1902, 24 P.R. 1903; 46 P.R. 1906, *Appr*; 20 P.R. 1879 (F.B.); 169 P.R. 1888, R.

- (5) *Contract of sale—Arbitration—Jurisdiction of Court—Consent of parties—Inherent jurisdiction.*

In a contract of sale made at Kasur in the Punjab for the purchase of rape-seed consisting of 24 clauses, cls. 20 and 23, provided that, should a dispute arise under the contract, it should be settled by two European arbitrators appointed at Karachi by the buyers and sellers respectively, that, for all purposes, the contract should be deemed to have been made in Karachi and to be performed there and that the Karachi Courts should, except for the purpose of enforcing any award made in pursuance of the arbitration, have exclusive jurisdiction over the parties.

In a suit to file the award under the Act, the defendants contended that the Judicial Commissioner's Court at Sind had no jurisdiction to entertain the suit.

Held, that the question whether or not the Court had jurisdiction to file the award and enforce it as a decree depended upon, whether or not it had jurisdiction to entertain a suit of which the subject-matters were disputes arising out of contracts entered into outside the jurisdiction of the Court.

Held, also, that as the cause of action arose beyond the jurisdiction of the Court, it could not base its jurisdiction on a fiction invented by a couple of possible litigants (p), and that the application to file the award should be rejected.

Jurisdiction—(Continued).**—2.—(Of Civil Courts)—(Continued).**

"Inherent jurisdiction" of a Court means nothing more than its ordinary, permanent jurisdiction; and, if a Court does not possess inherent jurisdiction over the subject-matter in suit, the agreement of parties cannot confer it (b).

The Judicial Commissioner's Court in Sind has not jurisdiction to try all suits for breach of contract. It has power to try only a certain class of such suits. **Louis Dreyfus and Co. v. Miran Bux Kadir Bux**, 2 Sind. L.R. 37.

CROUCH, A.J.C.

References.—(a) 1 A.C. 602 (619) and 29 C. 707 (715), R. (b) 9 B.H.C.R. 242 (246); 14 I.A. 160 (167) and 18 I.A. 134 (135); L.R. 6 Q.B. 155 (159); 11 B. 153 (159), R. 22 W.R. 101, D.

(6) *Suits under S. 77 of Registration Act to direct registration of will disposing of property worth more than Rs. 2,500 in value—Court Fees Act, S. 7, cl. 4 (c)—Art. 17 (6)—Article applicable—Valuation for purpose of jurisdiction—Suit Valuation Act—Jurisdiction of Munsiff's Court.*

A Munsiff has no jurisdiction to try a suit brought under S. 77 of the Registration Act to direct registration of a will, where the will in question disposes of property more than Rs. 2,500 in value. The suit is one to which Art. 17 (6) of the second Schedule of the Court Fees Act applies and not one to which S. 7, cl. 4 (c), is applicable; that is to say, it is a suit, in which it is not possible to estimate at money value the subject-matter in dispute, and which is not otherwise provided for in the Act (a).

Per WHITE, C.J.—As regards the question of value for the purposes of jurisdiction, the valuation for the purposes of Court-fees is conclusive.

Per SUBRAHMANYA AIYAR, J.—In the absence of specific statutory provisions, the jurisdiction of Courts with reference to the pecuniary value of the subject matter ought, having regard to the general considerations underlying the condition of the mofussil Courts in the country to depend upon a basis ascertainable and determinable by the Court itself wherever that is practicable and not upon mere will of one of the parties to the litigation, viz, the plaintiff (b).

There is nothing in a case such as this which presents any peculiar difficulty in the way of the Court easily settling the question of the

Jurisdiction—(Continued).**—2.—(Of Civil Courts)—(Continued).**

value of the interests affected by the document so as to bring it within the class of cases in which it is expedient to leave the plaintiff to put on his own valuation of the subject-matter.

Per MILLER, J.—In valuing the present suit for purposes of jurisdiction, the rule of valuation based on the value of the interest created by the instrument should be adopted (b). **Ramu Aiyar v. Sahkara Aiyar**, 17 M.L.J. 573 (F.B) = 3 M.L.T. 73 = 31 M. 89.

WHITE, C.J., SUBRAHMANYA AIYAR AND MILLER, JJ.

References:—(a) 8 C. 515; 12 M.L.J. 88, F; 12 M.L.J. 87, Diss. (b) 31 C. 849; 34 C. 352; 28 A. 545; 13 M. 56, R.

(7) Death of the defendant before the presentation of the plaint—Jurisdiction of Civil Courts to substitute his legal representatives. See Civ. Pro. Code, No. 228, 17 M.L.J. 551.

(8)—under S. 20, Civ. Pro. Code—Stay of proceedings on application—No jurisdiction to entertain suit which otherwise cannot be entertained. See Civ. Pro. Code, No. 42, 5 A.L.J. 88.

(9) Suit to set aside Government order imposing full assessment on lands granted for religious purposes—S. 4 of Pensions Act—Jurisdiction of Civil Courts. See ACT XIII OF 1871 (PENSIONS), No. 1, 17 M.L.J. 549 = 3 M.L.T. 104.

(10)—to direct action of the Revenue authorities under Bengal Land Registration Act. See BENGAL ACT VII OF 1876 (LAND REGISTRATION), No. 1, 12 C.W.N. 441 (P.C.).

(11) Power of District Judge to remand case after it had been tried on the merits. See Civ. Pro. Code, No. 97, 7 C.L.J. 379

(12)—Whether ousted by pendency of a prior suit in the Court of Political Agent at Muscat. See Civ. Pro. Code, No. 7, 1 Sind L.R. 166.

(13) The Civil Court has no jurisdiction to issue commission for examination of witnesses on grounds not mentioned in C.P.C.—Conditions which confer such jurisdiction—Power of High Court to interfere with order of Subordinate Courts passed without jurisdiction. See COMMISSION, No. 1, 3 M.L.T. 246.

(14) Question as to adverse possession—Jurisdiction of District Judge on appeal. See ADVERSE POSSESSION, No. 1, 3 M.L.T. 299.

Jurisdiction—(Continued).**—2.—(Of Civil Courts)—(Continued).**

(15)—to review decisions of quasi judicial bodies, like Municipality, regarding assessment of taxes: See ACT III OF 1884 (BENGAL MUNICIPALITIES), No. 1, 12 C.W.N. 709.

(16) Land actually taken up by Government different from that mentioned in declaration—Collector's proceedings void—No valid reference to Civil Court. See ACT I OF 1894 (LAND ACQUISITION), No. 2, 8 C.L.J. 39.

(17) Power of Court to go behind agreement between vakil and client and fix a reasonable remuneration. See VAKIL'S REGULATION, No. 1, 23 T.L.R. 41.

(18) Record-of-rights made in 1896—Application to correct entry in it made before amending Act of 1898 of Bengal Act of 1885—Jurisdiction of Civil Court to try, though proceedings commenced prior to amending Act. See ACT VIII OF 1885 (BENGAL TENANCY), No. 23, 12 C.W.N. 987.

(19) Power of Court to issue injunction where there is no allegation that the property the subject of the suit is likely to be wasted or renewed by defendants. See CIV. PRO. CODE, No. 264, 4 M.L.T. 91.

(20) Inherent powers of Courts in this country to give effect to orders of His Majesty in Council. See MESNE PROFITS, No. 5, 11 O.C. 235.

(21) Suit for a scheme of management of a temple and for appointment in the meanwhile of a receiver—Subject of suit—Power of Court to appoint receiver. See CIV. PRO. CODE, No. 54, 4 M.L.T. 88.

(22) Suit by mortgagee to recover possession from mortgagor on failure by the latter to pay stipulated rent—Omission to apply for mutation of names—Punjab Tenancy Act, 1887, S. 77 (3) (e). See LANDLORD AND TENANT, No. 19-(b), 1 P.R. 1908 (Rev).

(23) Compensation money paid to Hindu widow on reversioner's application for reference—Order by Judge on reference directing refund—Judge could not proceed to deal with application under S. 32, Land Acquisition Act—Incompetency of Judge to direct refund of money already paid by Collector. See ACT I OF 1894 (LAND ACQUISITION), No. 19, 12 C.W.N. 1039.

Jurisdiction—(Continued).**—2.—(Of Civil Courts)—(Continued).**

(24) Jurisdiction of Courts to pass order for remuneration to a committee of a lunatic. See ACT XXXIV OF 1858 (LUNACY, SUPREME COURT), No. 1, 10 Bom. L.R. 772.

(25) Discretion vested in the Municipal Commissioner to remove objectionable structures—Court's interference with the discretion. See ACT III OF 1888 (CITY OF BOMBAY MUNICIPALITY), No. 1, 10 Bom. L.R. 821.

(26) Civil Court, whether can give effect to an order of the *Thathanabaing* or of any other ecclesiastical authority until such order is confirmed by a judgment and decree of the Civil Court. See BUDDHIST LAW (ECCLESIASTICAL), No. 1, U.R.R. (1908), 2nd Quarter, Buddhist Law (Ecclesiastical), 1.

(27) Civ. Pro. Code, S. 16 (d)—Sale of immoveable property in foreign territory by order of British Insolvency Court—Property not solely that of insolvent—Two-thirds of property owned by plaintiffs—Suit to recover two-thirds of purchase-money, whether a suit for the determination of an interest in immoveable property—Jurisdiction of British Courts barred. See CIV. PRO. CODE, No. 37, 122 P.R. 1908.

(28)—to set aside award, if may be ousted by consent of parties. See ARBITRATION, No. 4, 13 C.W.N. 63.

(29) Suit for declaration that plaintiff had *muqarraridari* rights in *shamilat* land—Suit cognisable by Civil Court. See CUSTOMS (PUNJAB—SHAMILAT LAND), No. 1, 189 P.L.R. 1908.

(30)—to order sale instead of division in partition suits, after decree directing partition in a particular mode. See ACT IV OF 1893 (PARTITION), No. 1, 10 Bom. L.R. 23.

(31) Appeal dismissed under S. 551, C.P.C., is a decree superseding that of Court below—Court having jurisdiction to amend decree under S. 206, C.P.C., is that which took action under S. 551. See CIV. PRO. CODE, No. 301, A.W.N. (1908), 109.

(32)—of Subordinate Judge to entertain suit to enforce public charitable trust—S. 539, Civ. Pro. Code—District Judge. See CIV. PRO. CODE, No. 289, 10 Bom. L.R. 87.

(33) Munsiff empowered to exercise final—under S. 153 of the Bengal Tenancy Act, 1885—Whether he ceases to have the power by reason

Jurisdiction—(Continued).**—2.—(Of Civil Courts)—(Concluded).**

of transfer from station. See ACT VIII OF 1885 (BENGAL TENANCY), No. 26, 12 C.W.N. 448.

(34) Permission to plaintiff in appeal to withdraw suit with liberty to file fresh suit and get the benefit of an alteration in substantive law. See CIV. PRO. CODE, No. 232, 10 Bom. L.R. 625.

(35) Suit for removing water-course constructed with permission of canal officer. See ACT VIII OF 1873 (NORTHERN INDIA CANAL AND DRAINAGE), No. 1, 74 P.R. 1907.

—3.—(Of Civil and Revenue Courts)

(1) *Suit for declaration that plaintiffs, who are occupancy tenants, are not liable to pay haq bua—Jurisdiction.*

A suit for a declaration that the plaintiffs, who are occupancy tenants, are not liable to pay "door tax" *haq bua* to the defendants, who are the proprietors of the village is cognisable only by the Revenue Courts and not by the Civil Courts. **Gamu v. Karim Khan**, 33 P.R. 1908 (F.B.)=83 P.W.R. 1908=171 P.L.R. 1908.

CLARK, C.J., ROBERTSON AND KENSINGTON, JJ.

References—95 P.R. 1907, 67 P.R. 1905, 89 P.R. 1895, F.

(2) *Suit for wages—Rate fixed by Record of Rights*

A suit for the wages of a labourer is cognisable by a Civil Court, and the fact that the rate of wages is fixed by the record of rights does not make the wages payable a cess, S. 77 (3) (j) of the Punjab Tenancy Act is not applicable. **Gujar v. Dula**, 41 P.R. 1908=88 P.W.R. 1908=178 P.L.R. 1908.

REID, J.

References—110 P.R. 1896 (Rev.); F. 67 P.R. 1890, R.

(3) *Suit for declaration of mukarraridari rights.*

The Civil Court has jurisdiction to entertain a suit by a person for a declaration that he has mukarraridari rights in certain land. The fact that a mukarraridar is a tenant, not a sub-proprietor, does not necessarily make S. 77 of the Punjab Tenancy Act applicable to the suit. **Nawab Khan v. Sewa Das**, 42 P.R. 1908=87 P.W.R. 1908=187 P.L.R. 1908.

REID, J.

Jurisdiction—(Continued).**—3.—(Of Civil and Revenue Courts) —(Ctd).**

(4) *Jurisdiction—Central Provinces Rent Law (Act IX of 1883), S. 43—Central Provinces Tenancy Act of 1898, S. 45, cl. (3), 47—Occupancy holding, transfer of part of—Limited interest - Adverse possession.*

When statutory rights and liabilities have been created, and jurisdiction has been conferred upon a special Court for the investigation of matters, which may possibly be in controversy, such jurisdiction is exclusive and cannot concurrently be exercised by the ordinary Court.

When a transfer of occupancy holding was effected without the consent of the landlord at a time when the rent law in force was Act IX of 1883 as amended by Act XVII of 1889, the Civil Courts have jurisdiction to entertain a suit for ejectment. But it is otherwise after the passing of the Central Provinces Tenancy Act of 1898 (b).

The change made in the law in this respect in 1898 is not of procedure only, it affects substantive rights.

S. 43 of the Tenancy Act of 1883 refers to transfers of entire holdings and not of a portion only. So long as the original tenancy subsists the landlord has no right to re-enter and oust the persons, who are in the land by license from the tenant (c).

The possession of a limited interest in immoveable property may be just as much adverse for purpose of passing a suit for the determination of that limited interest, as adverse possession of a complete interest in the property operates to bar a suit for the whole property: but such adverse possession of a limited interest though a good plea to a suit for ejectment, is good only to the extent of that interest; the nature and effect of possession must depend upon the nature and extent of the rights asserted by the overt conduct or express declaration of the person relying on it there can be no acquisition by adverse possession of an absolute title, when nothing but a limited interest has been asserted (d). **Icharam Singh v. Nilmony Bahida**, 7 C.L.J. 499=12 C.W.N. 636=85 C. 470.

STEPHEN AND MOOKERJEE, JJ

References.—(a) 2 C.L.J. 359, F. (b) 3 C.P. L.R. 70, 4 C.P.L.R. 49, 59, 172, R. (c) 3 P.C. L.R. 70, R. (d) 2 C.L.J. 125, F

Jurisdiction—(Continued).

—3.—(Of Civil and Revenue Courts)—(Ctd.).

(5)—*Res judicata—Suit for possession of Revenue paying land included by mistake in the Ejectment Decree passed by a Revenue Court—Punjab Tenancy Act XVI of 1887, S. 77—Civ. Pro. Code (Act XV of 1882), S. 13.*

S sued for possession of 8 kanals 6 marlas of land, alleging that he was occupancy tenant of 6 kanals 18 marlas belonging to O and others, and had become proprietor of the remaining 1 kanal 8 marlas by long adverse possession.

He took some land on lease from C and others, who sued for his ejectment in a Revenue Court and obtained a decree, which by mistake and without his knowledge included the land in suit in the land from which he was to be ejected, and that he was ejected from it in execution of said decree.

Held, that, the suit as framed is of the civil nature, and that neither any provision of the Punjab Tenancy Act nor, under S. 13, Civ. Pro. Code, the previous decree of the Revenue Court, bars a Civil Court from taking its cognizance (a). *Shib Dyal v. Must Chirag Bibi*, 73 P.W.R. 1908=124 P.L.R. 1908

SIR WILLIAM CLARK, C.J., AND REID, J.

References:—(a) 44 P.R. 1891 and 45 P.R. 1891 (F.B.); 3 P.R. 1895; 64 P.R. 1898 and 68 P.R. 1901, F.; 140 P.R. 1906 and 30 A. 44, D.; 17 M. 106 and 25 A. 138, F.

(6)—*Claim for damages by an occupancy tenant—Punjab Tenancy Act (XVI of 1887) Ss. 14, 77 (3) (u) and 99.*

Held, that a claim by an occupancy tenant based on the ground that he has been prevented by force from cultivating his holding, is cognisable by a Civil and not by a Revenue Court. *Miran Baksh v. Ghanaya*, 55 P.W.R. 1908=114 P.L.R. 1908.

JOHNSTONE, J.

(7) *Question of proprietary title—Decision by Assistant Collector—Appeal—Agra Tenancy Act (II of 1901), Local, Ss. 177 and 199.*

It is the intention of the Legislature, that all suits, in which questions of proprietary title are raised, should be decided by Civil Courts.

Where a suit for ejectment was brought in the Court of an Assistant Collector, and the

Jurisdiction—(Continued).

—3.—(Of Civil and Revenue Courts)—(Ctd.).

defendant denied that he was a tenant, and the Court decided to determine the question of title, it ceased to be a Revenue Court and became for the moment a Civil Court. An appeal against the decision in such cases should be preferred to the District Judge. If an appeal was preferred to the Commissioner, the Commissioner's decision was without jurisdiction and did not operate as a bar to any subsequent proceeding. *Genda v. Sukh Nath Rai*, 4 A.L.J. 686=A.W.N. (1907), 271=30 A. 25.

KNOX, A.C.J., AND RICHARDS, J.

(8) *Suit to set aside a lease of co-parcenary property.*

Held that a suit brought by co-sharers against a lambardar to set aside a lease of co-parcenary property granted by the lambardar as in excess of his powers was properly cognisable by a Civil Court. *Nihal Chand v. Rustam Ali Khan*, A.W.N. (1908), 77=5 A.L.J. 564.

AIKMAN AND KARAMAT HUSAIN, JJ.

Reference:—A.W.N. (1897), p. 207, R.

(9) *Mortgage of revenue paying land with possession—Mortgagee to receive malikana by way of interest at a certain rate within a fixed time or to get actual possession in case of default—Relation of landlord and tenant not thus created—Limitation of twelve years for possession is to run from the date of default—Punjab Tenancy Act, XVI of 1887, S. 77, cl. (u), Indian Limitation Act (XV of 1877), Art. 135—Construction of the mortgage deed and lease.*

Held, that, where a mortgage of revenue paying land is with possession, but the mortgagee is to charge interest at a certain rate on the mortgage money and leaves the mortgagor to occupy the land in consideration of receiving, within a fixed time, a lump sum, as *malikana*, calculated at that rate, and the mortgagor agrees to pay interest at an enhanced rate if he fails to pay the *malikana* regularly, and, in case of making default in payment of the interest, further, allows the mortgagee either to eject him to take a share of the produce by division or to realize rent as *Chakota*, the relation of landlord and tenant is not thereby created between the mortgagee and the mortgagor, and an ejectment suit of this nature does not fall within the jurisdiction of a Revenue Court (a).

Jurisdiction—(Continued).**—3.—(Of Civil and Revenue Courts)—(Ctd.).**

Held, also, that limitation of twelve years for obtaining possession of the land in dispute prescribed under Art. 135 of Act XV of 1877 began to run from the date of making default in payment of the *malikana* or interest. **Nathan Singh v. Mina Mal**, 17 P.W.R. 1908.

ROBERTSON AND SHAH DIN, JJ.

References.—(a) 19 A. 496 and 20 A. 401, R.
(b) 14 B.L.R. 315, R.

(10) *Jurisdiction—Dehkan Agriculturists' Relief Act (XVII of 1879)—Traders owning land not protected by the Act—Civ. Pro. Code, Ss. 57 and 588 (b).*

Held, that traders who invest their money in land and then go bankrupt are not entitled to the protection of the Dekkan agriculturist, but are amenable to the ordinary Courts. **Girdhari Das v. Gobind**, 6 P.W.R. 1908 = 85 P.L.R. 1908.

KENSINGTON, J.

Reference :—Mis. App. No. 10 of 1903, F.

(11)—*Landlord and Tenant—Agra Tenancy Act (II of 1901) U.P.S. 79—Order in ejectment—Suit in Civil Court by lessee of a tenant—Res judicata.*

An occupancy tenant leased his land to the plaintiffs. Subsequently he relinquished his rights in favour of the *Zemindar*. The *Zemindar* took proceedings in the Revenue Court and got the plaintiffs ejected and put other persons as tenants of the land in dispute. In the meantime he continued to take rent from the lessees but without prejudice to his contesting the lease. *Held* that the relation of landlord and tenant subsisted between the parties up to the date when the landlord got the lessees ejected. The suit of the lessees for possession was consequently a case which was cognisable by a Revenue Court and was therefore barred by the rule of *res judicata* on account of the judgment of the Revenue Court in ejectment proceedings. **Balwant Singh v. Girdhari Lal**, 5 A.L.J. 80 = A.W.N. (1908), 33.

KNOX, A.C.J., AND DILLON, J.

(11)—a) *Suit for kamiana dues that defendant ought to have collected for plaintiff—Punjab Tenancy Act, 1877, S. 77 (3) (j)—Whether suit cognisable by Civil Court or Revenue Court.*

Jurisdiction—(Continued).**—3.—(Of Civil and Revenue Courts)—(Ctd.).**

The plaintiff and the defendant, full brothers, owned between them a village, of which the defendant was *lambardar* and as such, collected all village cesses, etc. The plaintiff alleged that he and the defendant were entitled to certain *kamiana* dues from the *hamins* of the village, but that the defendant, with the object of causing loss to him, deliberately refrained from collecting these dues and sued to recover the amount due to his share ;

Held that the suit fell within the purview of cl. (j) of S. 77 (3) of the Punjab Tenancy Act and was one cognisable only by a Revenue Court and not by a Civil Court. **Abdul Rasul v. Feroz Din**, 128 P.R. 1908.

RATTIGAN, J.

Reference —49 P.R. 1891, R

(12) *Talukdar, objection by, in a partition proceeding between under-proprietors—Land Revenue Act (III of 1901), S. 111.*

In a partition proceeding between the under-proprietors in a Mahal, the Talukdar of the village lodged an objection about certain lands claimed by the under-proprietors, not being part of their under-proprietary holding.

Held, that the objection of the Talukdar could be entertained under S. 111, Act III of 1901. **Shankar Bakhsh Singh v. Sardar Singh**, 11 O.C. 252

EVANS, J.C.

(13) *Partition effected by Revenue Court—Civil Court's jurisdiction to consider objections thereto. See ACT III of 1901 (N.W.P. and O. LAND REVENUE), No. 9, 10 O.C. 363.*

(14)—*of Revenue and Civil Courts—Suit on bond executed for arrears of rent. See ACT XVI of 1887 (PUNJAB TENANCY), No. 16, 41 P.R. 1907 = 80 P.L.R. 1908.*

(15) *Decision of Tahsildar that a person is tenant—Whether bars suit in Civil Courts. See ACT IX of 1883 (TENANCY, CENTRAL PROVINCES), No. 4, N.L.R. 63.*

(16) *Suit for partition of certain isolated parts of land alleged to be held rent free—Whether excluded from the jurisdiction of Civil Court. See ACT II of 1901 (TENANCY, AGRA), No. 8, A.W.N. (1908), 197.*

Jurisdiction—(Continued).

—3.—(Of Civil and Revenue Courts)—(Old).

(17) Declaration that plaintiff as the adopted son of a tenant was entitled to his tenancy—Declaration of tenancy—Suit, whether cognisable by Civil Court. See ACT II OF 1901 (TENANCY, AGRA), No. 9, 5 A.L.J. 514.

(18) Village partitioned by Revenue Court into *mahals*—Mistake—Question relating to partition or union of *mahals*—Remedy of aggrieved party. See PARTITION, No. 7, 5 A.L.J. 725.

(19) Occupancy rights acquired by widow before the passing of Agra Tenancy Act—Widow's brother, devolution on—Suit by widows' brother for joint possession with widow's husband's brother, whether suit maintainable. See ACT II OF 1901 (N.W.P. TENANCY), No. 5, 5 A.L.J. 738.

(20) Act III of 1901 (U.P. Land Revenue), S. 233 (k)—N.W.P. Land Revenue Act, 1873, Ss. 132, 241—Partition. See ACT XIX OF 1873 (LAND REVENUE, N.W.P.), No. 1, A.W.N. (1908), 274.

(21) Darkhast of land within Port limits—Power of Divisional officer to make grant without consulting Presidency Port Officer. See DARKHAST RULES (MADRAS), No. 1, 18 M.L.J. 62.

(22) Financial Commissioner's power of reviewing his predecessor's order. See ACT XVII OF 1887 (PUNJAB LAND REVENUE), No. 1, 3 P.W.R. 1908 (Rev.).

(23) Suit for rent based on the tender of proper patta—Jurisdiction. See MADRAS ACT VIII OF 1865 (RENT RECOVERY), No. 4, 17 M.L.J. 601—3 M.L.T. 186.

(24) Suit for recovery of Putwari rate from under-proprietor—Jurisdiction of Rent Courts. See ACT XXII OF 1886 (ODISHA RENT), No. 3, 11 O.C. 326.

(25)—of Civil and Revenue Courts to decide whether land is rent-free or rent-paying—Jurisdiction of Revenue Courts, nature of. See SANAD, No. 1, 7 C.L.J. 202.

—4.—(Of Criminal Courts).

(1) Charge of a pleader for professional misconduct before the Joint Magistrate of a certain division—Transfer of the Magistrate before inquiry to another division—Right of District Magistrate to order the charge to be inquired by

Jurisdiction—(Continued).

—4.—(Of Criminal Courts)—(Concluded).

the Magistrate who was transferred to the other division. See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), No. 5, 3 M.L.T. 237.

(2) District Magistrate declaring a person to be a tout—Procedure—Personal inquiry necessary—Opportunity to show cause. See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), No. 2, 12 C.W.N. 842.

—5.—(Of High Courts).

(1) High Court—Jurisdiction over Sambalpur District—Extension of High Court's jurisdiction to place not within jurisdiction of any High Court, *if ultra vires*—Interpretation of Statute—Reference to repealed Statute—28 and 29 Vic., c. 15, S. 3.

Under S. 3 of 28 and 29 Vic., c. 15, the Governor-General in Council can extend the jurisdiction of a High Court or any portion of its jurisdiction to a place not originally within the jurisdiction of any High Court.

The proclamation whereby the Calcutta High Court was authorised to exercise jurisdiction over the Sambalpur District, when it was transferred from the Central Provinces to Bengal, was not *ultra vires*.

The repealed provisions of Ss. 18, 24 and 25 Vic., c. 105, were referred to as throwing light on the construction of S. 3 of 28 and 29 Vic., c. 15.

Construction of Statutes by reference to repealed Statutes when permissible, discussed by Mookerjee, J. *Baleswar Bagarti v. Bhagarathi Das*, 12 C.W.N. 657.

STEPHEN AND MOOKERJEE, JJ.

(2) High Court of Bombay—Temporary injunction—Injunction to a person not to proceed with his suit in the Small Causes Court at Bombay—Jurisdiction.

The High Court of Bombay has the power to issue an injunction against a person from proceeding in the Presidency Small Causes Court at Bombay with a suit referring to the same matter to which the suit in the High Court relates. *Uderam Kesaji v. Hyderally Abdul Kayum*, 10 Bom. L.R. 1141

MACLEOD, J.

(3) Power of High Court to revise order made by a Civil Court under S. 59, Bengal Land Registration Act. See ACT VII OF 1876 (LAND REGISTRATION), No. 4, 35 C. 571.

Jurisdiction—(Continued).**—5.—(Of High Courts)—(Concluded).**

(4) High Court—Original side, if may restrain disturbance of possession of immoveable property out of jurisdiction. See COURT OF WARDS No. 1, 12 C.W.N. 1065.

(5) Complaint to Subordinate Judge against pleader—Similar complaint to District Judge being sent to Subordinate Judge for inquiry and report—Sanction to pleader to prosecute for perjury—Confirmation by the District Judge—Power of High Court to interfere with order of Subordinate Judge. See CIV. PRO. CODE, No. 355, A.W.N. (1908), 273.

(6) High Court in revision has the power vested in a Court of appeal to fix a fresh date for deposit of money. See PRE-EMPTION No. 1, 11 O.C. 144.

(7) Attorney's application for taxation of his bill of costs for business not transacted in Court—Jurisdiction of High Court to make order—Rule 544 of the Bombay High Court See HIGH COURT RULES (BOMBAY), No. 6, 10 Bom. L.R. 76.

(8) *Ghair-mumkin* land attached to a well, suit for possession of—Chief Court's power to revise findings on facts relating to jurisdiction. See ACT XVI OF 1887 (PUNJAB TENANCY), No. 1, 12 P.R. 1907.

(9) —of the Bombay High Court to relieve person residing in Shanghai carrying on partnership business in Bombay—S. 5, Indian Insolvent Act See INSOLVENCY ACT, No. 1, 10 Bom. L.R. 84.

(10) —of the Court for the relief of Insolvent Debtors sitting in Bombay—Order under S. 26 of the Indian Insolvent Act (11 and 12 Vic., c. 21) against person outside the Bombay Presidency. See INSOLVENCY ACT, No. 4, 10 Bom. L.R. 77.

(11) —of High Court to dispense with the production of the certificate mentioned in Rule 116 of the original side of the High Court—Power to interfere with the discretion of Board of Examiners. See ATTORNEYSHIP EXAMINATION, No. 1, 12 C.W.N. 878.

—(Of Small Cause Courts).

(1) Suit on *pro-note* against agriculturist—Ch. XXXIX, Civ. Pro. Code—Deccan Agriculturists' Relief Act.

Jurisdiction—(Concluded).**—6.—(Of Small Cause Courts)—(Ctd.).**

Where the suit is for a sum under Rs. 1,000 based on a promissory note, and the defendant is an agriculturist, the provisions of Ch. XXXIX, Civ. Pro. Code, are not applicable, because he is entitled to the procedure and benefits prescribed by the Deccan Agriculturists' Relief Act. The suit lies in the Small Cause Court. **Thaoomal Manghanmal v Gul Mahomed Johurak**, 1 S.L.R. 243.

LUCAS, J.C., AND PRATT, A.J.C.

(2) Suit for a share of mesne profits, whether cognisable by a Court of Small Causes. See ACT IX OF 1887 (SMALL CAUSE COURTS), No. 3, 18 M.L.J. 88.

(3) Suit to recover moveable property deposited for safe custody or its value—Jurisdiction—See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURT), No. 6, 9 P.R. 1908.

(4) Suit for compensation for improper attachment—Not excluded from jurisdiction of Presidency Small Cause Courts—Excluded from jurisdiction of Provincial Small Cause Courts. See LIMITATION ACT, No. 49, 4 N.L.R. 49.

(5) Question whether cheque was presented within reasonable time, whether one of fact—Whether the Small Cause Court can refer such question to the opinion of the High Court. See ACT XV OF 1882 (PRESIDENCY SMALL CAUSE COURTS), No. 3, 4 M.L.T. 89.

(6) Maintainability of suit by auction purchaser for refund of purchase money. See CIV. PRO. CODE, No. 213, 114 P.R. 1908.

Kamat Land

—Acquisition of occupancy right in. See ACT VIII OF 1869 (LANDLORD AND TENANT), No. 1, 12 C.W.N. 436.

Karnayan.

(1) —of original tarwad ceasing to represent members of its divided taveris—proceedings in execution of decree against him not binding on such members without separate representation. See MALABAR LAW (TARWAD), No. 1, 3 M.L.T. 189.

(2) See MARUMAKKATHAYAM LAW.

Khasra.

—, admissibility of entries in remarks column of. See EVIDENCE, No. 2, 11 O.C. 195.

Kist.

Amount sent by landowner for payment of earlier kist—Collector wrongly appropriating it to later kist—Sale by Collector for realisation of earlier kist—Sale set aside. See ACT XI OF 1859 (REVENUE SALE LAW), No. 1, 12 C.W.N. 646.

Koran.

A copy of Koran is a valid consideration for *hiba bil ewas*. See MAHOMEDAN LAW (DOWER), No. 3, 13 C.W.N. 160.

Kudhi Kamini.

Suit to recover—Jurisdiction. See ACT XVI OF 1887 (PUNJAB TENANCY), No. 14, 95 P.R. 1907.

Lac.

—, description of—Deposit of lac on trees—Persons entitled to collect and carry away lac—Land let for agricultural purposes, not to be used to propagate lac. See LANDLORD AND TENANT, No. 19, 4 N.L.R. 104.

Lambardar and co-sharer.

(1) Powers of lambardar to deal with co-parcenary lands—Lease for seven years.

In the absence of a custom to the contrary, a lambardar, has no power, without the consent of the co-sharers, to grant a lease of co-parcenary land beyond such term as the circumstances of the particular year or season may require (a). *Tikam Singh v. Khubi Ram*, A.W.N. (1908), 65 = 5 A.L.J. 173 = 30 A. 163.

STANLEY, C.J., AND BURKITT, J.

References —(a) A.W.N. (1906), 257, F., A.W.N. (1906), 277, D.

(2) Suit by co-sharers against lambardar—Lambardar entitled to 5 per cent on the revenue—Agra Tenancy Act, S. 159—"Other dues" See ACT III OF 1901 (LAND REVENUE), No. 8, 4 A.L.J. 781.

Land.

(1) Land not being a "house, manufactory or building" and not being reasonably required for full and unimpaired use of a "house, etc." whether a part of such a house, &c., within meaning of S. 49 of Act I of 1894. See ACT III OF 1894 (LAND ACQUISITION), No. 20, A.W.N. (1908), 63.

(2) Street Tran. Lines whether land within meaning of S. 46 (1) (A), (a) of a Burma Municipal Act—whether such land is occupied by company within meaning of Ss. 68 and 69 of

Land—(Concluded).

Act. See ACT III OF 1898 (BURMA MUNICIPALITY), No. 1, 14 Bur. L.R. 23.

Land Acquisition Act.

See ACT I OF 1894.

Landlord and Tenant.

(1) Tenant's right to trees on the holding—Injunction.

The presumption of law, and the general rule in the absence of custom, is that the property in timber on a tenant's holding vests in the Zemindar, and that the tenant has no right to cut and remove such timber. But, in the absence of custom or of a contract to the contrary, a Zemindar has no right to interfere with the enjoyment by his tenant of the trees upon his holdings as long as the relation of landlord and tenant subsists.

Hence, where the Courts below granted to the plaintiff zemindar, an injunction, to restrain the tenants from offering obstruction to the cutting down and removal of the trees upon the holding, *held*, (affirming the judgment of Richards, J.) that the injunction was improper and had been rightly refused. *Ganga Dei v. Badham*, 5 A.L.J. 99 = 9 M.L.T. 194 = A.W.N. (1908), 51 = 30 A. 134.

STANLEY, C.J., AND BURKITT, J.

(2) Transfer of tenancy—Transfer apparent—Notice to old tenant—Validity of transfer not contested by him—Duty of landlord to grant patta to new tenant.

A person, claiming to have a patta tendered to him, as transferred from tenant, is bound, if called on, to produce the transfer, in his favour, for the Zemindar's inspection in proof of his claim, but if it is apparently in order and if after notice, which it is the Zemindar's duty to give, the old tenant does not contest the validity of the transfer, it is the duty (a) of the Zemindar to grant patta to the new tenant, even though there is no petition from the old tenant asking him to recognise the transfer. *Yadlamannati Venkatramiah Pantulu v. Sri Raja Venkata Rangiah Appa Row Bahadur Zemindar*, 3 M.L.T. 235 = 18 M.L.J. 37.

BENSON AND WALLIS, JJ.

Reference —(a) 29 M. 83, D.

(3) Landlord's title, denial of, for first time in suit, effect of—Notice to quit, conditions entitling tenant to.

Landlord and Tenant—(Continued).

The denial of title^a for the first time in a suit does not disentitle the tenant to a notice to quit, for the reason that the plaintiff is bound to show that at the date of suit he had a complete cause of action (a). **Peria Karuppan v. Subramania Chetty**, 3 M.L.T. 265 = 18 M.L.J. 153 = 31 M. 261.

WALLIS AND MUNRO, JJ.

References —(a) 17 M. 218; 15 B. 407; 13 C. 96 and 28 C 135, F; 17 M.L.J. 287, not F.

(4) *Non-transferable occupancy holding, transfer of—Abandonment—Permissive possession under transferee—Landlord's suit for khas possession.*

Where a tenant, having a right of occupancy not transferable by custom, had given up to the purchaser possession of all the culturable lands of the holding, but remained in possession of homestead lands only by permission of the purchaser.

Held that this was sufficient to indicate that the raiyat had abandoned his holding, and, in such a case, the landlord is entitled to eject the raiyat and the purchaser and get khas possession. **Sailabala Debi v. Sriram Bhattacharji**, 11 C.W.N. 878 = 7 C.L.J. 303.

BRETT AND SHARFUDIN, JJ.

(5) *Ejectment, suit for—Tenancies of homestead land—Tenancy created before the Transfer of Property Act—Abandonment or surrender—Notice to quit, if necessary.*

Previous to the passing of the Transfer of Property Act, tenancies of homestead land created for the purpose of habitation were not transferable except by custom or usage (a).

Where there has been an implied surrender of the land, and the former tenant has abandoned the land and transferred it to another and no longer pays rent for it, the landlord is justified in regarding the conduct of the former tenant as amounting to an implied surrender and is now entitled to take direct possession of it (b). **Hanuman Prasad Singh v. Deo Charan Singh**, 7 C.L.J. 309.

RAMPINI AND PARGITER, JJ.

References :—(a) 25 C. 896; 2 C.W.N. 122, P.; 7 B.L.R. 152; 15 W.R. 274, D. (b) 17 C. 826, D.

(6) *Right of tenant in the abadi on partition between co-owners—Not affected—Liability to pay rent—Ejectment.*

Landlord and Tenant—(Continued).

A partition between the co-owners cannot injuriously affect the rights which a tenant possessed before a partition took place.

Where, under a partition between two co-owners, the agricultural holding of a tenant fell to the share of one co-owner, and his house in the *Abadi* to the share of the other, *held*, that he continued to hold the house site as an appurtenant to his holding and could not be ejected. *

Held, further, that he was not liable to pay rent for his house site to the co-owner to whose share his house had fallen (a). **Saddu v. Behari Singh**, 5 A.L.J. 237 (F.B.) = 3 M.L.T. 371 = A.W.N. (1908), 123 = 30 A. 292

KNOX, BANERJI AND AIKMAN, JJ.

References .—(a) A.W.N. (1902), 60, *doubted*; 2 A.L.J. 588, A.W.N. (1901), 112, R

(7) *Disclaimer—Forfeiture*

There was no disclaimer by B of the relationship of landlord and tenant with A such as would cause a forfeiture of tenancy when B did not deny that he held the land as a tenant although he denied A's title to the interest of the landlord, A's case being that he acquired the landlord's interest at certain rent sales. **H. Mathenson v. Jadu Mahto**, 12 C.W.N. 525.

STEPHEN AND DOSS, JJ

References —10 C.B.N.S. 788 at p 796; 1 M. and G. 135, 695, R.

(8) *Occupancy holding—Transferability, local usage of—Evidence to prove—Transferee allowed to hold and pay rent as marfatdar—Mutation of name on payment of selami.*

Where it was proved by evidence that for 15 or 16 years before suit, occupancy holdings had been transferred in the Pergunnah as also in the village, and the landlords had allowed the transferees to hold possession and pay rent as *marfatdars* and granted them receipts as such, but would not substitute their names in the *sheristha* unless some payment was made by way of *selami* or *nazar*.

Held, that the evidence was insufficient to establish a custom or local usage of transferability of occupancy holdings. **Sreemutty Kurani Dani v. Sajoni Kant Singh**, 12 C.W.N. 589.

RAMPINI AND SHARFUDIN, JJ.

Landlord and Tenant—(Continued).

- (9) *Ejectment, suit for—Cultivating raiyat—Leases, construction of—Occupancy right accrues in what land—Bengal Tenancy Act (VIII of 1885), S. 21.*

Under the provisions of S. 21 of the Bengal Tenancy Act, if a tenant is an occupancy or settled raiyat in respect of some lands in a village, he is entitled to possession as an occupancy raiyat of the whole of the lands he holds in the village, *provided he holds them* (that is, the lands other than those of which he is an occupancy or settled raiyat) as a raiyat. But if he holds them as a tenure-holder, his occupation of some lands as raiyat will not give him the rights of a raiyat in the other lands. **Bufrangi Raut v. M. H. Mackenzie**, 7 C.L.J. 475.

RAMPINI AND BRETT, JJ.

- (10) *Partition between landlords Rights of tenants, how far affected.*

Two landlords by effecting a partition between themselves of their co-parcenary holding, cannot injuriously affect the rights possessed by a tenant prior to the partition proceedings, to which he was no party. **Dharam Singh v. Bhoolar**, 2 A.L.J. 588=A.W.N. (1908) 123.

BLAIR, J.

- (11) *Ejectment, suit for—Landlord and tenant—Denial of relation and setting up third party as landlord in a previous rent suit by some of the landlords—Joint lessors putting an end to tenancy—Transfer of Property Act (IV of 1882), S. 111—Intention to determine.*

A denial of the existence of relation of landlord and tenant and setting up a third party as landlord in a previous rent suit by some of the landlords amounts to renunciation of all by the tenant. The latter, therefore, incurs a liability to have his tenancy forfeited.

Though in England any joint tenant may put an end to his demise so far as it operates on his own shares, whether his companions join him in putting an end to the whole lease or not, yet according to the Indian decisions the relation created by the several joint landlords continues until there exists a new and complete volition to change it. This is the law when the *khas* possession is the relief asked for against the tenant but not in cases of trespassers and tenants when *khas* possession is not sought for (a).

Landlord and Tenant—(Continued).

Where the relation of joint landlords continues, the tenancy of the lessees cannot be put an end to except by all the lessees acting together.

Under S. 111 of the Transfer of Property Act, all the lessees must show their intention to determine the lease before they can succeed in a suit for ejectment. **Bhikharee Ram Mohoori v. Dhakeswar Pershad Narain Singh and Shiboo Ram Mohoori v. Dhakeswar Pershad Narain Singh**, 7 C.L.J. 489=35 C 807.

RAMPINI AND SHARFUDDIN, JJ.

References—(a) 11 B 644, R; 6 C.W.N. 575, 3 C.L.J. 201, D.

- (12) *Rent, suit for—Separate collection Suit to recover fractional share of rent.*

One of the co-sharee landlords who used to collect his share of rent separately can sue to recover arrears of rent due to him in respect of his fractional share. **Grindra Chandra Pal Chowdhury v. Sreenath Pal Chowdhury**, 7 C.L.J. 512.

MACLEAN, C.J., AND DOSS, J.

References—32 C. 567, D; 21 C. 869, 24 C 143 32 C. 336, R.

- (13) *Landlord and tenant—Co-sharer landlord—Suit for entire rent—Co-sharees made defendants—Maintainability of suit—'Landlord,' who is—Assignee of land as well as of arrears of rent.*

A co-sharer landlord is entitled to maintain a suit for the entire rent, if his co-sharees are, on their refusal to join as plaintiffs, made defendants in the suit (a).

The person to whom the land, the rent for which is claimed as also the arrears of rent, is transferred is an assignee of the whole interest of the landlord and is a 'landlord' within the Bengal Tenancy Act (b). **Sashi Kumar Mirbahar v. Sitanath Banerji**, 7 C.L.J. 425.

MACLEAN, C.J., AND COXE, J.

References—(a) 7 C.L.J. 139, F. (b) 4 C.W.N. 605, D.

- (14) *Landlord and tenant—Landlord jointly interested in holding—Partition, if effects a division of the holding.*

Plaintiff held land in joint tenancy with the defendants under herself as the landlord. The

Landlord and Tenant—(Continued).

shares of the plaintiff and the defendants having been separated by partition, the defendants contended that the plaintiff could not sue them for rent jointly but must bring a separate suit against each tenant.

Held—that there was only a division of the land, and not a division of the holding and the tenants remained jointly liable to the landlord for the entire rent. **Dukh Haran Singh v. Musst. Bibee Soghra**, 12 C.W.N. 568.

GRINDT AND CHITTA, JJ.

(15) *Tanka-tenure—Revenue-sale—(Act VII of 1868 B.C.), Ss. 1 and 14—Ejectment—Revenue Sale Law (Act XI of 1859), S. 29—Subsisting title at date of suit—Title, recognition of, as tankidar, if sufficient to give right of suit—"Revenue" and "proprietor" meaning of—Tankidar, amount due from, and payable to Government—Revenue—Sale by Collector for Government dues, if legal—Occupancy raiyats, protection of, from ejectment—Sale, effect of—Suit, frame of—Multifariousness—Tanka tenures, nature of settlement of—Regulation VII of 1822, S. 10, clauses 3, 4, 5, 7 and 8—Origin and incidents of such tenures.*

The word "Revenue," as defined in Act VII of 1868 (B.C.) includes every sum annually payable to the Government by the proprietor of an estate or tenure in respect thereof; and the word "proprietor," includes any tenant by whom any estate or tenure is held directly under the Government.

Upon the disappearance of the Zemindars who held the tenures (*tanka tenures*) directly from the Government under successive temporary settlements, upon their refusal to take fresh settlements at the time of a re-settlement, the *tankidars* came into direct relations with the Government and became proprietors of the tenures which were thenceforth held by them under the Government within the meaning of S. 1 of Act VII of 1868 (B.C.) and the sum annually payable by them in respect of the tenures would be rightly described as revenue, within the meaning of the same provision of the law; and the Collector has ample authority to bring such tenures to sale under the provisions of Act VII of 1868 (B.C.).

If the *tankidars* in a body are the tenure-holders liable for the payment of the Government revenue, each of them *prima facie* has to contribute a portion of the sum payable. The

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payment of such sum by any *tankidar* is payment by him in his character as a member of the body of *tankidars*; merely because he cultivates the land in his occupation, he cannot be regarded as a cultivating raiyat under the entire body of *tankidars* which includes himself as a member. The *tankidars* cannot therefore be regarded as occupancy raiyats protected from eviction under S. 14 of Act VII of 1868 (B.C.).

The cause of action of a plaintiff suing in ejectment cannot be affected by the title under which the defendant prefers to hold possession. What concerns the plaintiff is that another is wrongfully in possession of what belongs to him and that fact gives him his cause of action. What the plaintiff is entitled to claim is the recovery of possession of the land as a whole and not in fragments, and all persons who oppose him in the enforcement of that right are concerned in his cause of action and ought accordingly to be made parties to the suit in which he seeks to eject them, and particularly so, when they combine to keep him out of possession (a).

It cannot be affirmed as a matter of law that upon default of payment by a *tankidar*, the entire village is liable to be brought to sale so as to destroy the right of all the tenure-holders. The question depends upon the circumstance whether the settlement originally was under cls. 3, 4 and 5 or under cls. 7 and 8 of S. 10 of Reg. VII of 1822.

The fundamental distinction between the two kinds of settlement is that in the case of settlement under cls. 2, 3 and 4, the settlement is made with a *Sudder Malguzar* who represents all the persons interested in the property, and his default makes the entire tenure liable for sale unless there is a provision to the contrary in the settlement, and in the case of a settlement under cls. 7 and 8, there is a settlement with a selected person as *Sudder Malguzar*, but his default does not make the entire tenure liable to sale, unless there is a specific provision to the contrary in the settlement.

A settlement can be made under cls. 7 and 8 only in the case of cultivating proprietors who hold their tenure in *puttedari* or *bhyacharee* or similar form (c). **Bandhu Acharja v. Nathni Bahar Singh**, 7 C.L.J. 460.

MOOKERJEE AND HOLMWOOD, JJ.

References:—(a) 29 C. 871, R. (b) 14 W.R. 1 and 15 W.R. 141, R.

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- (16) *Abatement of rent of portion of which tenant did not obtain possession—Bengal Tenancy Act (VIII of 1885), Ss. 38 and 52.*

Where in a suit for rent a tenant who did not obtain possession of a portion of the lands let out to him, pleaded that he was not bound to pay rent of that portion.

Held,—that he was entitled to say so and it was not necessary for him to bring a separate suit for abatement of rent.

That a suit under Ss. 38 and 52 of the Bengal Tenancy Act was not necessary, as those sections do not apply where the tenant has never been put into possession by the landlord. **Siba Kumari Debi v. Bipradas Pai Chowdhury**, 12 C.W.N. 767.

MAGLEFAN, C.J., AND DOSS, J.

- (17) *Concurrent leases—Landlord entitled to recover rent only as against second lessee*

Held that where a lessor executes two concurrent leases of the same property, that is to say, two leases in which the term of the second commences before the term of the first has expired, the second lessee is to be taken as the assignee of the lessor's interest during the concurrent portion of the terms, and the lessor after the execution of the second lease can recover rent only from the second and not from the first lessee. **Ram Anant Singh v. Shankar Singh**, A.W.N. (1908), 152=5 A.L.J. 429=30 A. 369.

STANLEY, C.J., AND KARAWAT HUSAIN, J.

Reference —(a) 3 C. and K., F.

- (18) *Landlord parting with his interest after the accrual of rent, if he has a first charge—Decree, character of—Putni Regulation (VIII of 1819), S. 13, cl. (4)—Durputndar's lien, if superior to landlord's charge—Bengal Tenancy Act (VIII of 1885), S. 165*

There is nothing in the law which disentitles a landlord to a first charge, because, after the accrual of the rents he sued for, he parted with his interest in the zemindari (a).

The character of the decree a suitor obtains depends on the nature of the claim, and of his right to the relief sought for, and is not altered by any change in his position which may have taken place subsequent to the accrual of his right to sue (b).

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A *durputndar* in possession of *putni* under S. 13, cl. (4) of the Putni Regulation has only a lien, not a first charge, on the *putni*.

A landlord, who, though after the accrual of the rent sued for, parted with his interest in the zemindari, has a priority over a person having a lien under S. 13, cl. (4) of the Putni Regulation, and can, under S. 165 of the Bengal Tenancy Act, sell it free of all encumbrances. **Maharaj Bahadur Singh v. A. H. Forbes**, 7 C.L.J. 652=35 C. 737.

RAMPINI AND SHARFUDDIN, JJ.

References —(a) 6 C.W.N. 91, *Cons.* (b) 3 C.W.N. 604 and 31 C. 550, *not li.*

- (19) *Lease—Lessee cannot obtain ownership by prescription—Right of landlord to carry away trees on tenant's lands—Tenant's right to the natural produce of trees—Deposit of lac on trees—Persons entitled to collect and carry away lac—Land let for agricultural purposes—Not to be used to propagate lac—Tenant leaving certain plot unploughed—Growth of palas tree—Tenant's right to cut palas trees when arises.*

"Once a tenant always a tenant." Where a tenant has possession and enjoyment of certain land by virtue of his lease, he can never obtain ownership by prescription in any part of his leasehold, during the term of the lease (a). The ownership in trees standing on tenancy lands is always with the landlord, and whenever such trees, or any parts thereof, are severed from the soil, under the general law, such trees and parts can be taken away by the landlord. This general law may be varied by contract or custom, but in the absence of these, it is the law to be applied (b). While the landlord is the owner of the trees on the lands of his tenants, the tenant is entitled to the natural produce of such trees, namely, fruits and flowers as long as there is no custom or contract to the contrary (c).

Lac is a dark red transparent resin which is the deposit of an insect on the twigs of the *palas* or *paras* trees. It is neither timber nor fruit. It can only be collected by lopping off the twigs to which it is adherent. These several branches of the trees standing in tenant's lands are the property of the landlord, and in the absence of a special contract or custom to the contrary, the *lac* spontaneously deposited must go with them. The landlord is entitled to enter the land, in a reasonable manner, for the purpose of collecting and carrying away such produce.

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Where there is no custom or contract to the contrary, the landlord or tenant cannot make use of the land let for agricultural purposes for the propagation of *lac*, for, where the letting is purely for agricultural purposes, the tenant is bound to occupy and use the land for agriculture and for purposes subservient to agriculture. The landlord may take such reasonable steps as may be necessary to protect the *lac* already on the trees. But with the protection and removal of existing *lac*, the landlord's right comes to an end, while the tenancy lasts. The *occupancy right* over the entire holding lies in the tenant, and for the time being, he is in physical possession of the trees. The landlord cannot disturb that possession. He cannot conserve the existing plantation, nor add to it, as if it were situated on his home-farm. The tenant can use the entire area for agricultural purposes and, except with his consent, the landlord cannot appropriate any part thereof for *lac* industry. The tenant can insist on the removal, within a reasonable time, of the whole existing *lac*, so that he may clear the land for the plough. But it is only when the tenant is ready to bring any area under the plough that he can insist on the necessary clearance; otherwise he may render himself liable in damages. **Hiria v. Mahomed Sirajuddin Khan**, 4 N.L.R. 104.

STANYON, A.JC.

References:—(a) 3 C.P.L.R. 160, *F.* (b) 22 C. 742; 21 A. 297; 23 A. 211, *relied on*; 23 A. 126; 10 C.W.N. 425, *not appl.* (c) 1 C.P.L.R. 145, 7 C.P.L.R. 7, *relied on*.

(19-a) *Non-agricultural land—date from which tenancy runs—Notice to quit—Validity—Collector signing notice on behalf of Government.*

In a case where it was quite uncertain as to what was the date from which a tenancy in respect of non-agricultural land ran.

Held, per RAMPINI, J.—That the presumption was that the tenancy was a monthly tenancy expiring with the last day of each month of the Bengali year.

Where the notice to quit with respect to such a tenancy was dated the 25th July, 1899, and was served on the tenant on the 8th of August following, and the tenant was desired to quit on the last day of the month of *Chait* 1306 (12th April, 1900).

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Held, per RAMPINI, J.—That the notice was valid.

Further, that, when such notice was given on behalf of Government, the Collector was competent to sign it. **Rakhal Chandra Tewary v. The Secretary of State for India in Council**, 10 C.W.N. 841=8 C.L.J. 34

RAMPINI AND WOODROFFE, JJ

(19-b) *Stut by mortgagee's heirs to recover possession of land from mortgagor's heir on failure to pay stipulated rent—Omission to apply for mutation of names, effect of—Punjab Tenancy Act, 1887, S. 77 (3) (e).*

By a deed of mortgage, certain land was mortgaged with possession, and the mortgagor agreed that, for a term of six years, he would hold as tenant under the mortgagee and pay rent at a certain rate. In default of payment of rent, he was to pay interest at a certain rate, and in default of redemption in six years, the land was considered to be sold. No interest or rent had ever been paid nor had the mortgagee applied for mutation of names in his favour, although he was bound to report the acquisition of his right by S. 34 of the Land Revenue Act. After the death of the parties to the original transaction and after 12 years had elapsed, during which no action had been taken on the mortgage, the mortgagee's heirs sued the mortgagor's heirs for possession under the deed. *Held*, that the mortgagor's heirs did not occupy the position of mere tenants of the mortgagee and that the plaintiffs were not entitled to be put in possession as landlord, inasmuch as the mere execution years ago of a document of that character not acted upon in any way and not even brought to the notice of the revenue authorities could not be held to alter the status of the owner into that of the tenant of the mortgagee. **Nizam v. Budhan**, 1 P.R. 1908 (Rev.)=6 P.W.R. 1908 (Rev.)

WILSON, F.C.

(20) *Wajib-ul-arz (1884)—Tenant's right to cut down trees with landlord's consent—Refusal of consent, grounds for.*

A clause in *Wajib-ul-arz* of 1884 provides that the tenants can, with consent of, and after informing the landlords, cut trees situated in their court-yards, fields, when required for agricultural implements used or for the repairs of dwelling houses. The intention of *Wajib-ul-arz* is that the tenants should ordinarily be entitled to cut down trees for the purposes mentioned,

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but that the landlord should have the opportunity and the right to prevent the unjustifiable exercise of this power, or its abuse, and not that he should be entitled to forbid the tenant to exercise the right at all, without assigning any reason at all. **Subhan v. Niamat Khan**, 2 P.R. 1908 (Rev.).

WILSON, F.C.

- (21) *Right to sue—Incumbrances, suit to avoid—Purchaser from a purchaser at a revenue sale—Putnidar—Permanent Settlement, tenure from before—Long possession—Presumption—Direct evidence.*

A purchaser from a purchaser at a sale for arrears of Government revenue as well as a putnidar are persons who can sue to avoid encumbrances or under-tenures created since the permanent settlement.

It is not necessary that direct evidence should be given to prove the existence of a tenure from before the permanent settlement in order that it might be protected from avoidance on account of sale for arrears of Government revenue. A presumption in favour of its existence arises from the proof of the existence of a tenure for a very long time, say from 1824 (a). **Ananda Chandra Poddar v. Kunjo Behari Pal**, 8 C.L.J. 177.

MITRA AND BELI, JJ.

References —(a) 14 M.I.A. 152 (173) and 12 B.L.R. 210 (215) (P.C.). R.

- (22) *Default of landlord—Sale of tenant's crops more than necessary to satisfy arrears of rent—Benefit of balance—Presumption*

Where the tenant's crops were attached for the default of the landlord, and more crops were sold than were sufficient to satisfy the amount of rent in arrears, it must, in the absence of evidence, be presumed that the landlord had the benefit of the balance and that he is accountable therefor to the tenant. **Rangasami Naicken v. Y. N. Saminada Pandaram**, 4 M.L.T. 65.

WHITE, C.J., AND SANKARAN NAIR, J

- (23) *Landlord's right to restrain tenant from cutting fruit bearing trees.*

A landlord is entitled to restrain the tenant from cutting down fruit bearing trees (a). **Raja Thimmanarayanum Bahadur Garu v. P. Rama Rayanun Garu**, 4 M.L.T. 187.

SANKARAN NAIR AND ABDUR RAHIM, JJ.

Reference. —(a) 30 M. 155, F.

Landlord and Tenant—(Continued).

- (24) *Ejectment—Notice to quit—Interessee termini, persons having, rights of—Form of notice—Damages—Acceptance of rent after expiry of notice to quit, if waiver.*

An *interessee termini* is an existing real right which gives the owner thereof an immediate right of entry and, consequently, entitles him to serve a notice to quit to the tenant in possession.

The plaintiff who had an *interessee terminum* gave notice to quit, through his attorneys, to the defendant, a tenant in possession, in the following terms —“ We give you notice that our client will require you to vacate and give up possession of the premises on the 29th February now next, and that should you fail to comply with the request, our client will take proceedings against you to eject you from the premises, and he will charge you the sum of Rs. 350 per mensem as damages sustained by him during such period as you continue in possession after the 29th proximo.”

Held, it was good clear notice to quit and the addition of the second portion of the notice did not vitiate it (a).

The defendant began to occupy the tenement from the 1st April, 1904, and submitted that the notice to quit ought to have been made to expire on the 1st March and not the 29th February.

Held, the notice to expire on the 29th February was good, although it would be more usual to make the notice expire on the 1st March (b).

A plaintiff who has an *interessee terminum*, may, if his right to immediate entry is interfered with, maintain an action for damages (c). **Adolphe Shrager v. Emma Price**, 12 C.W.N. 1059.

FLETCHER, J

References —(a) 7 A. 899, diss., 4 Ex. D. 201, F., 1 Douglas, 175, R. (b) (1895) 1 Q.B. 378, F. (c) 32 W.R. (Eng.), 943, F.

- (25) *Closing of irrigation channel—Act of Government servant—Authorized by statute—Tortious eviction—Right to withhold rent.*

Plaintiff sued the Manager, Encumbered Estates, alleging that he had taken a lease from the defendant of certain lands irrigated by a certain canal, and that subsequently the Executive Engineer “illegally” closed the said canal and deprived the lands of their utility. Plaintiff, therefore, claimed damages for the loss of

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profits and prayed for an injunction to restrain the Manager from recovering by warrant the rent reserved in the lease, as the closing of the canal was a breach of the lessor's covenant for possession without interruption.

Held, that, as the plaint averred that the interruption was caused by the Engineer who acted illegally, the plaintiff's remedy was against that officer and not against the Manager, and that the covenant was not a covenant against tortious eviction.

Held also that the Engineer, in so doing, was not acting as the agent of the Government (i.e., of the alleged paramount title), as the duty was imposed upon him, not by the will of Government, but by statute (e.g., the Bombay Ligation Act VII of 1879) (a). **Dayomal Adatmal v. The Manager, Encumbered Estates in Sind**, 1 S L R. 244.

LUCAS, J.C. AND PRATT, A.J.C.

References —(a) 33 L.J.C P 199, 28 B. 314, 8 W R. 327, *li*.

(26) *Forfeiture by tenant—Intention to determine lease—No act showing such intention—Whether suit can be brought before any such act is done.*

Where a plaintiff neither proved nor alleged that, before bringing his suit for ejecting a tenant, he did any act showing his intention to avail himself of the forfeiture, on which the suit was based, and determine the lease, *held* that the plaintiff was not entitled to rely on the forfeiture. **Yenkataramana Bhatta v. Gundu Raya**, 4 M.L.T. 221 = 31 M. 403.

ARNOLD WHITE, C.J., AND BENSON, J

Reference :—33 C. 339 = 3 C.L.J. 274, *P*.

(27) *Right of zemindar to include " Pirallavaru " cess in the pattah.*

The cess called " Piratlavaru " cess, being a mere voluntary contribution, the landlord is not entitled, as of right, to insist upon the cess being included in the pattah (a). **Gutta Yenkatasubbanna v. Raja Yengoti Govinda Krishna Yachandrudu Ya Yaru Bahadur**, 4 M.L.T. 438.

MUNRO AND PINHEY, JJ.

Reference :—(a) 28 M. 43, *P*.

(28) *Tenant building on zemindar's land—Non-intervention of zemindar's agent—Acquiescence—Estoppel.*

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Where one person builds on the land of another, an abstinence by the owner will not be sufficient to raise an equitable estoppel against him. In addition to the abstinence on his part, there must be a mistaken belief in the builder that the land was his own. **Muhammad Umardaraz Khan v. Maru**, A.W.N. (1908), 282.

KARAMAT HUSAIN, J.

References —21 A. 496; 16 A. 328, 27 A. 398; 29 A. 658, A.W.N. (1881), p. 114, 20 A. 248, 1 E. and I.A. 129, 1 A. 182, *referred to*.

(29) *Water-rate—Increase—Absence of express covenant in lease, as to apportionment—Rule to be followed.*

In the absence of any express covenant in the lease, as to apportionment of any increase in water-rate, the increased water-rate should be shared, like the local and village cesses, between the landlord and the tenant **Sri Raja Kandu Kuri Seshamma Garu v Sooram Balaramaswami**, 4 M L.T. 460

MILLER, J.

(30) *Construction of deed—Cess, liability to pay—Cess Act (IX B.C. of 1880), S. 41—Mokurari lease.*

A perpetual *mokurari* lease implies that the tenancy is permanent, heritable and transferable, and that the rent is fixed in perpetuity

It is open to the Zemindar and the tenureholder to contract themselves out of the provisions of S. 41 of the Bengal Cess Act.

Where in a perpetual *mokurari* lease the rent was fixed by a clause which runs.—" At varying *jamas*, to wit, at an annual uniform *jama* of Rs. 1,580 from 1284 to 1291 (Fasli) and at an annual uniform consolidated *jama* of Rs. 1,585 of the current coin from 1292 (Fasli) together with *abwab* such as *selami* for Dussarah and Holi, Purkha, San, Road cess, Public Works cess, etc., all of which are included in that very sum of Rs. 1,585."

Held, that the contract does not provide for the contingency which happened in this case, namely, an increase in the amount of cesses levied by the State.

Held, also, that if any additional cess is imposed or if the amount of cess is increased, the incidence of the new burden must be regulated

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according to the statute. **Mahanand Sahai v. Musamat Sayedunissa Bibi**, 12 C.W.N. 154.

MOOKERJEE AND CARRPERSZ, JJ.

(81) *Notice to quit—Demand of increased rent or ejectment in the alternative.*

When a landlord wrote to the tenant asking him to come to an agreement with him to pay increased rent, and concluded by saying "otherwise I shall take steps to eject you and hence you consider this as 15 days' notice expiring with the end of this month,"

Held, that this was a good notice to quit. **Ganga Das Sill v. Ananda Chandra Roy**, 13 C.W.N. 146.

STEPHEN AND HOLMWOOD, JJ.

(32) Suit for possession by tenant against landlord and persons claiming melwarum rights under him—Court-fees. See COURT FEES ACT (VII OF 1870), No. 8, 17 M.L.J. 478.

(33) Suit for ejectment—Notice to quit—Tenant at will—Agricultural holding—Notice addressed to tenant as trespasser if legal. See EJECTMENT, No. 1, 7 C.L.J. 107.

(34) Party cultivating specified land in question—Proprietary title. See ACT II OF 1901 (N.W.P.), No. 13, 5 A L.J. 71.

(35) —, effect of non-payment of rent for many years on relationship of. See SANAD, No. 1, 7 C.L.J. 202.

(36) Suit by landlord to recover possession of land after tenancy—Trespasser getting into possession during tenancy—Jurisdiction of Mamlatdar's Court. See ACT II OF 1906 (MAMLATDAR'S COURTS), No. 1, 9 Bom. L.R. 1179=32 B 46.

(87) Mortgage of revenue paying land with possession—Mortgagee to receive *malikana* by way of interest and a certain rate within a fixed time, or to get actual possession in case of default—Relationship of landlord and tenant not thus created. See JURISDICTION (OF CIVIL AND REVENUE COURTS), No. 9, 17 P.W.R. 1908.

(38) Land acquisition proceedings—Apportionment of compensation between landlord and tenant—Presumption of permanency of holding from uniform payment of rent. See ACT VIII OF 1885 (BENGAL TENANCY), No. 9, 12 C.W.N. 432.

(39) Acceptance by landlord of muchilika executed by tenant—Whether it is evidence of

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pattah being dispensed with. See ACT VIII OF 1865 (MADRAS RENT RECOVERY), No. 8, 3 M.L.T. 280.

(40) Decree against landlord, if admissible in evidence against tenant. See SALE CERTIFICATE, No. 1, 7 C.L.J. 384.

(41) Mortgage by tenant of absolute occupancy holding—Surrender by tenant of the holding to landlord—Landlord accepting rent from mortgagee in possession—Effect on equity of redemption. See MORTGAGE (UNFRICTIONARY), No. 2, 4 N.L.R. 57.

(42) Denial of landlord's title—Subsequent receipt of rent from tenant—Effect on forfeiture. See TRANSFER OF PROPERTY ACT, No. 78, 12 C.W.N. 587.

(43) Lease executed by tenant in the name of a benamidar—Benamidar's right to sue for rent. See EVIDENCE ACT, No. 94-b, 31 M. 461.

(44) Tenant of lands in a joint mahal taking a mortgage with possession of a share therein, liability of, to pay rent as tenant to the lamhardar. See ACT XXII OF 1886 (RENT), No. 1, 11 O.C. 75.

(45) Tenant building structure on land adjoining demised land—Forfeiture of tenancy. See LEASE, No. 2, 53 P.R. 1908.

(46) Sub-division of holding—Rights of purchaser—Landlord's title not questioned. See ACT VIII OF 1885 (TENANCY, BENGAL), No. 17, 8 C.L.J. 161.

(47) Landlord, even if an influential one, is not presumed to be in a position to dominate the will of his tenants. See UNDUE INFLUENCE, No. 1, 8 C.L.J. 135.

(48) Execution of muchilika by tenant, whether operates as acknowledgment of rent due—Admission by landlord through his pleader that claim was barred—Effect. See LIMITATION, No. 11, 4 M.L.T. 83.

(49) Acquisition of tenant right by one of several co-owners. See CO-OWNERS, No. 2, 4 N.L.R. 120.

(49-a) Attornment by donor's tenant to donee under unregistered document. See TRANSFER OF PROPERTY ACT, No. 81, 4 M.L.T. 327.

(50) Lessee's failure to renew lease—Forfeiture. See TRANSFER OF PROPERTY ACT, No. 76, 4 M.L.T. 315.

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(51) Lessor and lessee—Payment of rent by lessee in good faith—Liability of the lessee to pay rent to the rightful owner. See TRANSFER OF PROPERTY ACT (IV OF 1882), No. 9, 10 Bom. L.R. 1190.

(52) Co-sharer landlords collecting share of rent separately—Whether separate tenancy constituted. See REG. VIII OF 1819 (PUTNI), No. 1, 8 C.L.J. 554.

(53) Presumption of permanency of holding—Case where it may be legally made. See EJECTMENT, No. 5, 8 C.L.J. 513

(54) Under-ryot in possession having paid rent due by ryot—Surrender by ryot—Effect of such surrender on landlord's claim to *has* possession. See ACT VIII OF 1885 (BENGAL TENANCY), No. 14, 13 C.W.N. 97.

(55) Contract between landlord and tenant modifying provisions of Act as to interest on arrears of rent. See ACT VIII OF 1885 (BENGAL TENANCY), No. 12, 13 C.W.N. 95.

(56) Entries in *bahara papers* as to rent payable by tenant, whether evidence against tenants. See ACT V OF 1897 (PARTITION), No. 2, 13 C.W.N. 93.

(57) Under-proprietor acquiring superior proprietary rights—Merger of under-proprietory tenure. See MERGER, No. 1, 11 O.C. 188.

(58) Relationship of. See JURISDICTION OF CIVIL AND REVENUE COURTS, No. 11, 5 A.L.J. 30.

(59) Landlord's proportionate liability to pay water-rate—Water supplied at tenant's request. See MADRAS ACT (VIII OF 1865), No. 2-a, 18 M.L.J. 563.

(60)—See LEASE.

Landlord and Tenant Act.

See ACT VIII OF 1869 (BENGAL).

Land Registration Act.

See ACT VII OF 1876 (BENGAL).

Land Revenue Act.

(1)—See ACT XVIII OF 1881 (C. Pro.)

(2)—See ACT III OF 1901, (N.W.P. and OUDH).

(3)—See ACT XVII OF 1887 (PUNJAB).

Land Revenue Code.

See ACT V OF 1879 (BOMBAY).

Lease.

(1) *Condition for payment of rent in advance—Suit by purchaser of demised property for rent—Registration—Notice.*

Certain property was leased for a term of ten years, the lease containing a provision to the effect that, if at any time during the currency of the lease, the lessor should demand any portion of the rent in advance from the lessee, the latter should be bound to pay it on obtaining a receipt. Subsequently to the execution of this lease, the demised property was sold by auction in execution of a decree. The auction purchaser sued the lessee for rent, but was met by the plea that the rent claimed had been paid to the lessor in advance under the terms of the lease. The lease was registered, and it was found that the auction purchaser had not made inquiry of either the lessor or the lessee, as to whether or not any rent had been paid in advance, according to the terms of the lease. *Held* that, under those circumstances, the plaintiff was not entitled to recover. **Nand Kishore v. Anwar Hussain**, A.W.N. (1908), 13=5 A.L.J. 91=3 M.L.T. 195=30 A. 82.

STANLEY, C.J., AND BURKITT, J.

(2) *Tenant building structure on land adjoining demised land—Forfeiture of tenancy—Condition and terms of the lease*

Where a lease provided that the lessee should not erect any structure on the portion adjoining that leased out without the lessee's permission, *held*, that by the erection of new structures without permission, the lessee did not forfeit his tenancy as the provision relating to non-interference was not a condition of the lease, but only its term.

A forfeiture may be incurred for a breach of any covenant only in case the lease contains a condition or proviso for re-entry for a breach of such covenant (a). **Miran Bakhsh v Aziz Bakhsh**, 53 P.R. 1908=106 P.W.R. 1908.

LAL CHAND, J.

Reference.—(a) 26 M. 157; 28 A. 400, *l.*

(3) *Lessor and lessee—Contract of lease—Suit for specific performance—Suit for possession of immovable property—Limitation Act (XI of 1877), Arts. 113, 144, Sch. II.*

Where the lessors contracted to give possession to the lessees but did not do so, and the lessees brought a suit for possession, more than three years afterwards, *held*, that the suit was

Lease—(Continued)

one for the specific performance of the contract and was governed by, Art. 118, and not Art. 144, Sch. II, Limitation Act, and the suit was barred by time. **Charna v. Bans Lal**, 5 A.L.J. 529=A.W.N. (1908), 245=4 M.L.T. 445.

AIKMAN AND KARAMAT HUSAIN, JJ.

(4) *Lease, unregistered, when admissible in evidence—Transfer of Property Act (X of 1882), Ss 107 and 130— Lien—Charge—Assignment.*

Where a lease which requires registration is not registered, it cannot be put in evidence. But, if parties to it have acted upon its terms, if certain course of conduct has been pursued by either which, in point of fact, constitutes the relation of landlord and tenant between them, and if, in pursuance of that relation, one party has deposited money as security for the due performance of covenants in the lease, then a person suing to recover the money deposited may give the lease in evidence for the purpose of proving his right to recover the deposit.

The admission of the lease for such purpose does not contravene the provisions of the Registration Act, because it is used for a collateral purpose.

S 107 of the Transfer of Property Act does not say that, if parties without any lease conduct themselves towards each other as if they are landlord and tenant, and moneys pass from one to the other in pursuance of that conduct upon the understanding that it will be repaid in a certain event, there can be no right to recover that money. In such a case the right to recover arises, not upon the lease, because according to law no lease exists, but upon an independent equity arising from the conduct of the parties and founded upon the law of estoppel.

The mere fact that parties have described a transaction as a 'lien' or 'charge' cannot deprive it of its real nature, if in substance the transaction is an assignment. Where a creditor purports to create a lien or charge on the debt due to him in favour of another person, the word 'lien' or 'charge' has no meaning except as giving the latter a right to recover the debt from the debtor. The transaction is in reality one whereby the owner of what in English law is called a *chose in action* transfers it to another. **Ardeshir Bajasji Surji v. Syed Sirdar Ali Khan**, 10 Bom.L.R. 1146.

CHANDAVARKAR AND BATCHELOR, JJ.

Lease—(Continued).

(5) *Accession to leased land by alluvion—Right of lessee—Transfer of Property Act, S 108—Difference between lands temporarily inundated and those becoming part of a river bed.*

By a lease-deed, the lessor gave a lease of his jaghir land to the plaintiff, which provided, after giving the measurement of the land, that the lessee would be entitled every season to cultivate them, both *kacho* and *pako*, and appropriate all produce realised from the land, as also from trees, pasturage and fishing. At the foot of the deed, the boundaries of the jaghir were given, and the boundary to the east was stated to be the river Indus. Subsequently 200 *jerebs* of land were washed away by the river, and later on a piece of land about 2,000 *jerebs* was added to the jaghir by the river having receded. In a suit by the plaintiff for enforcing his right to the accessions, the defendant contended that the jaghir was subject to large variations in area, through the action of alluvion, diluvion and dereliction, and that all accessions were held and enjoyed by him as part of the jaghir.

Held that the land in dispute was included in the term "*kacho*" and that the plaintiff was entitled to such accession, not only under the lease-deed, but also under S. 108, Transfer of Property Act (a).

The owner never loses his proprietary right in the land that is merely inundated, it always remains his land and the water over it is not part of a public river. But when land has once become the bed of a public river, it ceases to be the property of the former owner until it is again restored by the river, and even then he can only assert his right, if he can clearly identify the land (b) **Seth Asandas v. Mir Hassan Khan**, 2 Sind L.R. 1.

LUCAS, J. C., AND CROUCH, A J. C.

References — (a) 8 B. 256 and 25 W.R. 390, R (b) 2 R.H.C.R. 345 (347), 4 I.A. 402 and 18 W.R. 113, R.

(6)—of co-parcenary land for seven years by *lambardar* without consent of co-sharers, whether valid. See **LAMBARDAR AND CO-SHARER**, No. 1, A.W.N. (1908), 56.

(7) Suit to set aside lease of co-parcenary property—Jurisdiction. See **JURISDICTION (OF CIVIL AND REVENUE COURTS)**, No. 8, A.W.N. (1908), 77.

Lease—(Continued).

(8) Denial of title of landlord by one of several joint lessees—Tenants not obtaining possession of whole area leased to them—Reference to lessor—No satisfaction—Taking lease of portion from stranger in possession—Forfeiture. See TRANSFER OF PROPERTY ACT, No. 78, 12 C.W.N. 587.

(9) Lessee agreeing with lessor to pay lessor's rent to superior landlord—Default—Sale of lessor's interest by superior landlord—Execution of decree—Suit by lessor against lessee—Sale not the natural consequence of lessee's default—Duty of lessor to pay rent—Lessee not liable for value of property. See LIMITATION ACT, No. 81, 12 C.W.N. 628.

(10) Execution of decree of Rent Court—Suit for possession and cancellation of lease—Lease made after passing of Agra Tenancy Act—Validity of lease. See ACT XII of 1891 (RENT), No. 2, 5 A.L.J. 472.

(11)—granted by Receiver—Proper remedy of aggrieved parties to set it aside is to institute a regular suit against receiver and lessee—Arrears of rent or interest due under granted by receiver cannot be dealt with in interlocutory application. See RECEIVER No. 2, 12 C.W.N. 1023.

(12) Deeds executed by proprietary body owning village *shamilat* land creating *muqarraridari* rights—Deeds constituted perpetual lease—Deeds not binding on owners who did not join in their execution. See CUSTOMS (PUNJAB—SHAMILAT LAND), No. 1, 189 P.L.R. 1908.

(13) Lessor and lessee—Payment of rent by lessee in good faith—Liability of lessee to pay rent to rightful owner. See TRANSFER OF PROPERTY ACT (IV OF 1882) No. 9 10 Bom. L.R. 1190.

(14) Unregistered dastak allowing plaintiff to take possession of land for cultivation—Document not a lease within S. 17 (d) Registration Act. See REG. XI OF 1825 (BENGAL ALLUVION AND DILUVION), No. 1, 8 C.L.J. 538.

(15)—if contract—Tenders, calling of, if necessary. See SPECIFIC RELIEF ACT, No. 13-a. 13 C.W.N. 129.

(16) See LANDLORD AND TENANT.

(17) See TRANSFER OF PROPERTY ACT.

(18) Lessor or representatives, effect of consent of, on position of tenant by sufferance holding over and on that of his representatives.

Lease—(Included)

See TRANSFER OF PROPERTY ACT, No. 79, 18 M.L.J. 26.

(19) Liability of lessees after transfer of their rights for rent—Lessees holding permanent leases included under term. See TRANSFER OF PROPERTY ACT, No. 75, 12 C.W.N. 724.

(20) Concurrent leases of same property—Landlord entitled to recover rent only as against the second lessee. See LANDLORD AND TENANT, No. 17, A.W.N. (1908), 152.

Legacy

(1)—charged on immoveable property—Property mortgaged by executor who was also residuary legatee—Lapse of time in paying legacy—Executor whether acting with legatee's consent. See EXECUTOR No. 2, 12 C.W.N. 993.

(2) Specific or demonstrative—Non-emption of legacy. See WILL No. 12 109 P.R. 1908.

(3) Testator bequeathing to widow life interest in income of certain portion of estate—Legatee (widow) not mentioned in will as executrix, whether entitled to probate. See PROBATE, No. 1, 73 P.L.R. 1908.

Legal Practitioners Act.

See ACT XVIII of 1879.

Legal Representative

(1) Decree against Hindu widow—Reversionary heirs of the widow's husband resisting execution against them on the ground that they were not the legal representatives of the widow—Procedure. See CIV. PRO. CODE, No. 139, A.W.N. (1908), 92.

(2) Purchaser at auction-sale in execution of a decree on a second mortgage—Liability to be joined as representative of judgment-debtor by a first mortgagee-decree-holder in execution of his decree. See CIV. PRO. CODE No. 137, 1 Sind L.R. 158.

(3) Dispute as to who is—under S. 367, Civ. Pro. Code, nature of. See CIV. PRO. CODE, No. 227, A.W.N. (1908), 139.

(4)—of creditor not in existence—Debtor ready to pay. See CONTRACT ACT, No. 1, 4 M.L.J. 335.

Legitimacy.

—of children born as issue of fifth marriage by a Mahomedan in presence of four living wives. See MAHOMEDAN LAW (MARRIAGE), No. 1, 6 P.R. 1908.

Letters of Administration.

- (1) *Letters of administration—Joint family—Probate and Administration Act, S. 4—Separate property—Daughter, right of, in preference to first cousin*

Held, that letters of administration cannot be granted in respect of joint family property.

Held, further, that daughters have a better right to letters of administration in respect of the separate property of the deceased than a first cousin. **Ajudhya v. Mussamat Ram Daiya**, 11 O.C. 101 (B).

CHAMBER, J.C., AND EVANS, A.J.C.

- (2) *Administration bond—Sureties' liability—Letters of administration obtained by fraud—Effect—Misappropriation by grantee—Sureties not parties to fraud—Revocation of grant.*

Although letters of administration have been obtained by fraud, so long as the grant remains unrevoked, the grantee, to all intents and purposes, remains the administrator, and he alone represents the estate, and his receipts are valid discharges for all monies received by him as administrator.

For his acts and defaults as administrator his sureties, though themselves not parties to the fraud or cognisant of it, are liable. **Debendra Nath Dutt v. The Administrator-General of Bengal**, 12 C.W.N. 802 (P.C.)

LORD MACNAGHTEN, LORD JAMES OF HERFORD, LORD ATKINSON, SIR ARTHUR SLOAN, AND SIR ARTHUR WILSON.

(3)—must be obtained before suit. See CIV. PRO. CODE, No. 73, 12 C.W.N. 738.

(4)—*de bonis non*—Court fee. See COURT FEES ACT, No. 14, 4 L.B.R. 255.

(5) Proper person to administer estate of Burmese Buddhist—Whether such letters could be granted to any person other than the widow or widower of the deceased. See ACT V OF 1881 (PROBATE AND ADMINISTRATION), No. 1 4 L.R.R. 293.

(6) Whether widow, to whom testator bequeathed life interest in portion of properties, entitled to Letters of Administration with will annexed, in respect of her interest? See PROBATE, No. 1, 73 P.L.R. 1908.

Letters Patent.

- (1) *S. 15—Appeal under—Whether confined to points disputed.*

Letters Patent—(Concluded).

On an appeal from a judgment of the two Judges of the High Court who have differed in opinion, the appeal is not confined to the point upon which the learned Judges differed, and the whole case is open on the appeal. **K.Y.S. Sheikh Mahomed Rayuther v. The British India Steam Navigation Co., Ltd.**, 4 M.L.T. 110 (F.B.)—18 M.L.J. 497.

WHITE, C.J., AND WALLIS AND SANKARAN NAIK, JJ.

Reference—11 M.L.J. 10, 17.

(2) Ss. 28, 90, scope of. See HIGH COURT, No. 1, 4 M.L.T. 186.

Letters Patent (Bengal).

S. 15—Order of remand passed by a single Judge of High Court—Whether "judgment"—Appeal. See CIV. PRO. CODE, No. 315-a, 35 C. 1096.

Letters Patent (Bombay).

- (1) *Cls. 10 and 39—High Court—Disciplinary jurisdiction—Order suspending a pleader from practice—Leave to appeal—Privy Council.*

No appeal lies by right of grant against an order of the High Court under cl. 10 of the Letters Patent, as it is not in the nature of a final judgment, decree or order under cl. 39; and, therefore, the High Court has no power to grant leave to appeal. The aggrieved party must proceed by way of petition to His Majesty the King for leave to appeal. **Ganesh S. Dandvate v. Government Pleader**, 10 Bom. L.R. 21=32 B. 106=3 M.L.T. 131.

KNIGHT AND MACLEOD, JJ.

(2) Cl. 15—Order passed by a Judge sitting on the Original Side of High Court requiring security from woman—Judgment. See CIV. PRO. CODE, No. 239, 10 Bom. L.R. 337.

Letters Patent (Calcutta, 1865).

- (1) *High Court. Letters Patent, 1865, Cl. 12; whether an objection that no leave was taken under Cl. 12 can be waived—Letters Patent, 1865, Cl. 12—Registrar, power of, to grant leave under Cl. 12 of the Letters Patent.*

The Registrar has no power to grant leave under Cl. 12 of the Letters Patent, 1865(a).

If the defendant is served and takes any step in the action except moving to set aside the service of writ on him, he waives the objection of want of jurisdiction on the ground that no

Letters Patent (Calcutta, 1865)—(Concluded).

leave under Cl. 12 was properly obtained and cannot be heard (b). **A. J. King v. Secretary of State for India in Council**, 7 C.L.J. 441 = 35 C. 394 = 12 C.W.N. 705.

FLETCHER, J.

References:—(a) 5 C.L.J. 405, *followed*. (b) 25 Q.B.D. 244 and 19 L.J. (Q.B.), 257, *referred to*.

Libel.

(1) *Newspaper libel—Publication for public benefit—Fair and bona fide comment, what constitutes—Administration of justice, how far matters for comment—Allegations of facts to be distinguished from comments—Imputation of criminal offence not comment—Privilege—Matters per se libellous—Want of justification, effect of—Defamation of a class—Rights of individuals of the class—Limitation—Judge of fact and law, duty of.*

The administration of justice is a matter for fair and *bona fide* discussion, but newspaper writers have to be careful as to the language they use, and it is essential for them to differentiate between comments and allegations of fact in which latter case, either the truth of such allegations, or privilege must be established in order to successfully defend an action for the publication of the libel. Imputing to a person the commission of a criminal offence does not come within the range of fair comment (a).

In the case of a libel against a class of persons, if the description in the libel can be shown to be applicable to one of such persons, that person may bring an action for damages for the libel (b).

Several plaintiffs joined to institute a suit well within the prescribed period of limitation; on an objection being raised as to misjoinder of parties and of causes of action, the plaint was amended by striking out the names of all the plaintiffs but one, who elected to continue to carry on the suit so instituted within time; *held*, the suit was not barred (c).

Per HARRINGTON, J.—A Judge in this country exercising the function of a jury would be bound to direct his mind to those considerations to which, had he been summing up to a jury, he would have been bound to direct their

Libel—(Continued).

minds. **A.S. Barrow v. Hem Chandra Lahiri**, 12 C.W.N. 490 = 35 C. 495.

MACLEAN, C.J., AND HARRINGTON AND FLETCHER, JJ.

References —(a) 4 F. and F. 202 (223); 42 J.P.P. 424; 11 App. Cas. 187 (190); 4 F. and F. 983 (1006) and 31 L.J. Ex. 133 (136), *followed*. (b) 1 H.T.C. 637, *followed*. (c) 1 Q.B. 771, *followed*.

(2) *Privilege—Trade protective society—Information as to position of business men supplied to subscribers for consideration—Volunteering of information—Welfare of society not served by such business—American authorities, value of.*

The defendants carried on the business of a trade protective society, their business consisting in obtaining information with reference to the commercial standing and position of persons in the State of New South Wales and elsewhere and in communicating such information confidentially to the subscribers to the agency in response to specific and confidential inquiry on their part.

Held, that the defendants are really to be regarded as volunteers in supplying the information which they profess to have at their disposal, and their motive in carrying on the business is self-interest.

That having regard to the method which will be naturally adopted in carrying on such a business, it is not for the welfare of the society that the protection which the law throws around communications made in legitimate self-defence or from a *bona fide* sense of duty, should be extended to communications made from motives of self-interest by persons who trade for profit in the characters of other people.

In cases which are near the line and in cases which may give rise to a difference of opinion, the circumstance that information is volunteered is an important element for consideration.

Held, in an action for libel brought against the defendants by a firm in respect of whom the defendants had made communications to a subscriber, that the same were not made on a privileged occasion (a).

Libel—(Concluded).

American authorities not followed. **Macintosh v. Dun**, 12 C.W.N. 1058 (P.C.).

LORD CHANCELLOR, LORD ASHBOURNE,
LORD MACNAGHTEN, LORD ROBERTSON,
LORD ATKINSON AND LORD COLLINS

References.—(a) 1 C.M. and R. 181 (193) and 1 De. G. and S. 13 (28), *relied on*

(3) Whether action for libel or slander will lie against accused persons defending themselves—Whether and when reply to notices of action are privileged—Whether such action will lie against judges, counsel, witnesses or parties for words written or spoken during proceeding before Court or legal tribunal. See *Tout*, No. 4, 18 M.L.J. 353

Lien

(1) Company—Expenditure, incurred by agent before winding up order, coming within S. 221 of the Contract Act—Agent's right to lien on properties and goods in possession. See *Contract Act*, No. 36, 3 M.L.T. 247.

(2) —created by S. 13, cl. 4, Putni Regulation, 1819, how extinguished—Collector's order, whether necessary—Recourse to regular suit whether essential—Extinction of lien, effect of—Lien, creation of statute—Whether statutory liens can be created by consent—Mere treatment of under-tenure-holder by landlord as usufructuary encumbrancer, whether sufficient to create statutory lien. See *Reg. VIII of 1819* (PUTNI), No. 3, 7 C.L.J. 604

(3) Document providing for re-payment of amount advanced when mortgage is redeemed without making it condition precedent to redemption Whether document creates additional lien on property. See *Act XVIII of 1884* (PUNJAB COURTS), No. 3-a, 197 P.J.R. 1908

Light.

Right to—Substantial interference—Cause of action, when arises. See *EASEMENT*, No. 1, 12 C.W.N. 519.

Limitation.

(1) *Appeal—Time spent in review—Pre-emption—Act IV of 1872, S. 16 (a)*—Value of structures added after purchase.

Held that, in computing the period of limitation for an appeal the time spent in prosecuting a review should be deducted (a).

Limitation—(Continued).

Held also, that in making demand of security under S. 16 (a) of Act IV of 1872, the value of the property as it stood at the time of sale can only be looked to, and not the value of improvements made by the vendee after purchase (b). **Jagat Ram v. Jacob**, 66 P.W.R. 1908

ROBERTSON, J.

References.—(a) 183 P.R. 1888, F. (b) 91 P.R. 1892, F.

(2) *Possession of land of donee dying without heir in male line—Cause of action—Art. 144, Sch. II to Limitation Act XV of 1877—Plaintiff to succeed on strength of his own title.*

Held, that a claim for possession of immovable property on the ground that it was gifted by plaintiff's ancestors and that on failure of the donee's male line plaintiff is entitled to succeed by custom, is barred by limitation if not brought within twelve years from the date on which the donee dies leaving no heir in the male line.

Held, that plaintiff is to succeed on the strength of his own title and not on the weakness of that of the defendant. **Badar Din v. Kale Khan**, 63 P.W.R. 1908

CHATTERJI, J

(3) *Appeal—Deposit of appeal in the box put up for the purpose—Proper presentation—Sufficient cause—Indian Limitation Act XV of 1877, S. 5—Civ. Pro. Code (Act XIV of 1882), S. 541—Important question of law—Punjab Courts Act XVIII of 1884, S. 70 (b)—Revision.*

Held, that, depositing a memo of appeal in the box put up by an Appellate Court for the purpose, amounts either to a proper presentation of it to the Court or is under second clause of S. 5 of the Indian Limitation Act (XV of 1877), a sufficient cause for not presenting it within the time prescribed therefor, and that the presumption is that it has been deposited therein by the appellant or by any other person duly authorised on his behalf.

Held, also that whether the circumstances disclosed in a particular case constitute a sufficient cause so as to bring it within the second paragraph of S. 5 of the Indian Limitation Act XV of 1877 is an important question of

Limitation—(Continued).

law under S. 70 (b) •(a). **Mela Mal v. Natha Singh**, 71 P.W.R. 1908.

RATTIGAN, J.

References:—(a) 101 P.R. 1890 and 29 A. 638, R

- (1) *Mortgage without possession by way of conditional sale of ancestral property by a childless proprietor—His widow selling that property along with other and parting with its possession—Suit by reversioner to recover—Expenses for "Chelum" ceremony no necessity—Art. I of Schedule to Punjab Act I of 1900—Art. 141 of second schedule to Act XV of 1877—Applicability of the two articles discussed*

On the 2nd December, 1886, R mortgaged his ancestral holding of 528 canals, 15 marlas by way of conditional sale, for Rs 1,200 to T, the mortgagor retaining possession. R died about 1887. On the 7th November, 1889, his widow sold the holding and some other land in addition, to T for Rs. 2,000, made up of the said Rs 1,200 plus some interest thereon and Rs. 700 on account of a mortgage by herself which included Rs. 600 alleged to have been borrowed for her husband's "Chelum." On the 7th November, 1899, T's sons re-sold the whole of the land for Rs. 3,000 to K.

About the end of 1901, R's widow died and G reversioner of R sued the sons of T and K for possession of the land.

Held, by the Full Bench that (a) so far as the sale by the widow is concerned the suit is governed by Art 141 of second schedule to the Indian Limitation Act (XV of 1877) and is within limitation, and (b) it is beyond time as regards the mortgage by R. The provisions of the Punjab Act No. 1 of 1900 apply to this part of the case and under Art. 1 of its schedule the reversioner's right to contest the validity of the said mortgage is barred. The mortgage is not merged in the sale by the widow and the mortgagees are entitled to fall back on, and to keep it alive for their own interests and can hold the property until the said sum of Rs. 1,200 is paid to them according to the terms of the mortgage-deed (a).

Remarks.—Defects in framing Punjab Act I of 1900 pointed out and its early amendment recommended.

Held by the Division Bench that a debt incurred by a Mahomedan widow for expenses

Limitation—(Continued).

of her husband's "Chelum" (i.e., the 40th day of death ceremony) is not binding on his reversioners **Khiali Ram v. Gulab Khan**, 70 P.W.R. 1908 (F.B.).

REID, ROBERTSON AND RATTIGAN, JJ. *

References.—(a) 71 P.R. 1898, 90 P.R. 1904 (F.B.), F.

- (5)—*Executor when debtor, time does not run—Limitation Act, S. 10—Civil Procedure Code, s 50—Bar for limitation—Ground to get over this bar may be changed subsequently.*

Where an executor who owes money to the deceased accepts the executorship, his debt becomes at once assets, and he is responsible for the amount of it. In that case no limitation would run as long as he remained executor or died, whichever happened first

When a plaintiff does satisfy the requirements of S 50 of the Civ. Pro. Code by stating what is, in his opinion, the ground upon which he intends to get over the bar of limitation, he ought not to be precluded from taking another, and not inconsistent, ground, should he be later advised that the latter is the true ground (a). **Yakub Ebrahim Sayani v. Bai Rahimatbai**, 10 Bom. L.R. 346.

BEAMAN, J.

Reference —(a) 31 C. 195, dissented from.

- (6) —*Mortgage—Possession of joint immovable property given in execution of money decree by one co-sharer to decree-holder until payment of decretal amount—Sale of his own interest by another co-sharer to stranger—Suit by vendee to eject decree-holder, Indian Limitation Act (XV of 1877), Art. 135—Adverse possession—Amendment of plaint not allowed.*

R and others in execution of their money decree applied for attachment and sale of land belonging to J and S. In July, 1882, J made over to R and others, the whole land to hold until the amount of their decree was repaid to them the produce being taken as equivalent to the interest on the decree money and revenue. S sold his share in the land to L who on 13th July, 1900, sued to eject R and others as trespassers ignoring the mortgage altogether.

Held, that J's making over the land, under the above circumstances, to R and others in July, 1882, was tantamount to mortgage of the land.

Limitation—(Continued).

Held, also, that L's claim as laid is barred by limitation in both ways :

(1) If there was any 'defect in the authority of J to effect the mortgage, it has been cured by the adverse possession for twelve years, of the mortgagees (decree-holders) to the extent of their mortgage interest :

(2) If the mortgage be altogether ignored as unauthorised, Art. 136 of the second schedule to the Indian Limitation Act XV of 1877 applied, as S was out of possession when he sold his share to L and was entitled to claim it on the date it was lost by the mortgage effected by J.

Practice "—Plaintiff's prayer to be allowed at this stage to amend the claim to one for redemption was rejected on the ground that he had all along strenuously fought to recover the land without any payment. **Lakhmi Chand v. Ram Chand**, 69 P.W.R. 1908

CHATTERJI AND JOHNSTONE, JJ.

(7) *Appellate Court finding plaintiff's claim to be barred by limitation—Starting point for limitation also to be fixed.*

Where a lower appellate Court holds the plaintiff's claim to be barred by limitation, it must also find the starting point of limitation **Kollipara Subbayya v Kollipara Pitchayya**, 3 M.L.T. 909.

WHITE, C.J., AND WALLIS, J.

(8) *Claim for damages for non-delivery of goods—Plea of limitation based on a special covenant between the parties—Clause 14 of the Indent—Its construction and applicability—Due date of draft explained.*

Where, in a claim for damages arising out of non-delivery of goods, a clause of the Indent provides that "no claim or dispute of any sort whatever can be recognised if not made in writing within 60 days from due date of draft "

Held, that the clause does not apply where the goods indented for are never delivered and no draft has been drawn for them. the words "due date of draft " do not mean the date on which draft drawn for goods shipped, had shipment been effected, would have fallen due. **Tannu Lal v. Behari Lal**, 54 P.W.R. 1908—127 P.L.R. 1908

REID, J.

(9) *Adverse possession. Limited interest. Right of permanent tenant—Registration*

Limitation—(Continued).

Act, Ss. 17 and 49—Unregistered lease, admissibility of, to prove adverse possession.

A person can acquire, by adverse possession, a limited interest such as that of a permanent lessee (a).

Where adverse possession of certain lands by the plaintiff, as a permanent tenant, for the statutory period, is the transaction to be proved in a suit, an unregistered permanent lease cannot be received as evidence of such transaction (b). **Subbayya v. Madduleiah**, 17 M.L.J. 469=3 M.L.T. 187.

BENSON AND WALLIS, JJ.

References —(a) 27 B. 515, R. (b) 27 B. 515 ; 25 W.R. 211, Diss., 2 R.R. 642, R.

(10) *Limitation for application under S. 206. Civ. Pro. Code—Civ. Pro. Code, S. 206—Remission, where the lower Court declined to correct a clerical error—Civ. Pro. Code S. 622.*

Held, that no question of limitation arises with regard to action under S. 206, Civ. Pro. Code (a).

Held further that, where the lower Court declined to correct a manifestly clerical error capable of correction under S. 206, Civ. Pro. Code, it constituted a failure to exercise jurisdiction which could be interfered with in revision by the High Court (b). **Sital Prasad v. Abdur-Rashid**, 11 O.C. 208.

GRIFFITHS, J. C.

References —(a) 11 B. 284 ; 10 M. 51 ; 21 C. 259, 4 A. 23 ; 9 A 364 ; 38 W.R. 746 ; T.R. A. C. 547 ; 1 Ch. 386, R., and (b) 7 A. 276 ; 8 A. 519 and 13 A. 78, R., 16 M. 424, D., and 6 A. 125 and 15 A. 121, F.

(11) *Execution of muchalika by tenant, whether operates as acknowledgment of rent due—Admission by landlord through his pleader that claim was barred—Effect.*

The execution of a *muchalika* by the tenant operates as an acknowledgment of the rent due.

Where an admission of the landlord through his pleader that a claim was barred was contrary to the fact such admission was held not to be binding on the landlord. **Kajana Ranga Row v. Venkatarama Aiyer**, 4 M.L.T. 83.

BENSON AND SANKARAN NAIR, JJ.

References :—22 M. 302 ; 20 M. 556, F.

Limitation—(Continued).

(12) *Non-joinder, Objection as to—Objection to be taken at the earliest opportunity—Code of Civil Procedure (Act XIV of 1882), S. 34.*

Where a defendant does not take any objection as to non-joinder of necessary parties in his written statement but does so upwards of six months afterwards, and the plaintiff thereupon makes an application for the names to be added which is done after the period of limitation for the suit had expired, *held*, that the suit is not barred by limitation as the defendant's objection as to non-joinder, not having been made at the earliest opportunity ought to have been disregarded with reference to S. 34, Code of Civil Procedure **Hazari Mal v. Bhawani Ram**, 5 A.L.J. 554 = A.W.N. (1908), 246 = 4 M.L.T. 447.

AIKMAN AND GRIFFIN, JJ.

References:—29 A. 311, D., 26 A. 528 and 28 B. 11, R.

(13)—provided in S. 42 of Chotanagpur Landlord and Tenant Procedure Act, whether applicable to suit by assignee from auction-purchaser of permanent tenure to recover possession from landlord—Period during which suit prosecuted *bona fide* in Court without jurisdiction to be excluded in computing limitation, though extension of time on that ground not asked in plaint. See ACT I OF 1879 (CHOTANAGPUR LANDLORD AND TENANT PROCEDURE ACT), No. 1, 12 C.W.N. 617.

(14) Sale of immoveable property—Property purchased by decree-holder—Decree-holder failing to obtain possession of property after sale confirmed—Property in the hands of judgment-debtor—Suit by decree-holder's assignee for possession of land barred by S. 244, C.P.C. See CIV. PRO. CODE, No. 142, 5 A.L.J. 285.

(15) Whether application for execution of decree, on the last day of twelve years succeeding the date of the decree, within time or barred. See EXECUTION OF DECREE, No. 11, 11 O.C. 57.

(16)—of rent suits—Fuslee year—Rent due on the last day of bhadra. See ACT VIII OF 1885 (BENGAL TENANCY), No. 32, 7 C.L.J. 106.

(17) Guardian *ad litem* of defendant-respondent, not made party to appeal until after the period of limitation for filing appeal—whether appeal barred. See GUARDIAN AD LITEM, No. 1, A.W.N. (1907), 290.

Limitation—(Continued).

(18)—three years' rule of, in Sch. III, Art. 2, cl. (b) of the Bengal Tenancy Act—Applicability to suits to recover money payable in respect of forest rights—S. 184 (1) of Tenancy Act—Obligation of Court to dismiss suit. See ACT VIII OF 1885 (BENGAL), No. 24, 7 C.L.J. 152.

(19)—saved by application for execution, though defective, containing prayer for notice under S. 248, C.P.C., enabling execution to proceed. See LIMITATION ACT, No. 133, 18 M.L.J. 14.

(20) Application to continue previous proceedings in execution, not a fresh application in execution. See EXECUTION OF DECREE, No. 4, A.W.N. (1908), 49.

(21) Suit to enforce mortgage bond brought against a mortgagor and the sons of his deceased brother, a co-mortgagor, more than six years after the due date of the bond, barred by—as against defendants other than the surviving mortgagor. See HINDU LAW (ALIENATION), No. 15, 7 C.L.J. 195.

(22) Duty of Courts to consider question of limitation *suo motu* and to be acquainted with the articles and other provisions of the Act. See LIMITATION ACT, No. 2, 27 P.R. 1908.

(23)—for execution of decree passed on appeal—Civ. Pro. Code, S. 240. See EXECUTION OF DECREE, No. 7, 34 C. 874 = 7 C.L.J. 305.

(24) Several plaintiffs instituting suit within time—Objection as to misjoinder of parties and causes of action—Amendment of plaint by striking out names of all plaintiffs, but one—Suit by sole plaintiff, whether barred. See LITEL, No. 1, 12 C.W.N. 490.

(25) Where two articles of Limitation Act govern a case—More particular and specific article governs the case. See LIMITATION ACT, No. 49, 4 N.L.R. 49.

(26)—in case of amended decree—Application for execution. See EXECUTION OF DECREE, No. 8, 11 O.C. 22.

(27) Last day of the period fixed for payment into Court of the pre-emptive price expiring on Gazetted holiday—Payment could be made when Court opens. See PRE-EMPTION, No. 1, 11 O.C. 144.

(28) Presentation of memoranda of second appeals, &c. See HIGH COURT RULES (BOMBAY), No. 1, 9 Bom. L.R. 1138 (F.B.) = 2 M.L.T. 410 = 32 B. 14.

Limitation—(Continued).

(29) Recital containing acknowledgment by some of several joint mortgagees—Effect—Recital concerning only some of the mortgaged properties—Effect. See MORTGAGE (REDEMPTION), No. 14, 23 T.L.R. 36.

(30) Decree as originally framed incapable of execution owing to the inclusion in it of a non-existent village—Decree amended—Application for execution of decree within three years from date of amendment—Application within time. See EXECUTION OF DECREE, No. 14, 5 A.L.J. 403.

(31) Execution of decree—Application for time, whether "step-in-aid of execution"—Previous application barred—Notice on judgment debtor—Estoppel. See EXECUTION OF DECREE, No. 17, 8 C.L.J. 193.

(32) Sale of immovable property under attachment ordered—No bidders—Notice to decree-holder giving him time to pay in fees for fresh sale—Decree holder taking no steps—Case ordered to be struck off—Decree-holder again applying for sale—Application not fresh one for execution, but one to revive previous proceedings—Application not barred. See EXECUTION OF DECREE, No. 20, A.W.N. (1908), 227.

(33)—for application for refund of money realised in execution of a decree afterwards reversed in appeal. See EXECUTION OF DECREE, No. 16, A.W.N. (1908), 206.

(34) Suit for possession—Cause of action—Dispossession—Whether plaintiff must prove possession and dispossession within twelve years. See POSSESSION, No. 7, 14 Bur. L.R. 200.

(35)—prescribed by S. 156 (3), Local Boards Act, whether applicable to suit for injunction. See ACT V OF 1884 (LOCAL BOARDS), No. 2, 4 M.L.T. 209.

(36) Possession acquired on a transfer contravening S. 3, Bhagdari Act, 1862—Such possession can become adverse and bar suit, by individual transferor or his representatives, for recovery. See ACT V OF 1862 (BHAGDARI AND NARWADARI), No. 1, 10 Bom. L.R. 1128.

(37) Suit for possession—Limitation a good plea, where tenancy not established. See POSSESSION, No. 10, 8 C.L.J. 557.

(38) Suit for dower by wife's heirs when her husband is executor—Whether husband can avail himself of three years' limitation and avoid paying dower. See MAHOMEDAN LAW (PARTITION), No. 1, 13 C.W.N. 153.

Limitation—(Concluded).

(39) Erroneous decision on—Not a sufficient ground of interference under S. 622, C.P.C. See CIV. PRO. CODE, No. 355-a, 4 N.L.R. 184.

Limitation Act

(1) S. 4—Presentation of insufficiently stamped plaint—Making up of stamp duty, subsequent to the period of limitation for the suit—Validity of the plaint—Court Fees Act, S. 28—Civ. Pro. Code, Ss. 48 and 54.

Held, (1) that the word "presented" in the Explan. to S. 4 of the Limitation Act should be interpreted in accordance with the provisions of the Civ. Pro. Code, S. 48, (2) that the Court Fees Act and the Civ. Pro. Code should be read together in regard to the presentation of plaints and the making up of stamp duty, but not with the provisions of the Limitation Act, which is not an Act in *pari materia*, (3) that, under S. 54 of the Civ. Pro. Code, and S. 28 of the Court Fees Act, deficiency in stamps can be made good by order of Court, irrespective of the question, whether, on the date of filing them, the limitation for the suit has expired or not, (4) that, under S. 28 of the Court Fees Act, on the making up of the deficiency of stamp duty by order of Court, the plaint and all proceedings relative thereto are validated from the date of original presentation, even though the limitation for the suit had since expired and (5) that, once the stamps are taken by the Court, the order cannot be subsequently set aside, nor the validation of the original presentation annulled. **Saif Ali Khan v. Fazil Mehdi Khan**, 123 P.R. 1907=82 P.W.R. 1907=3 M.L.T. 63.

CHATTERJEE AND JOHNSTONE, JJ.

References.—130 P.R. 1890, 74 P.R. 1903; 3 P.R. 1893, 156 P.R. 1888, *appr.*, 27 A. 411, 23 A. 423, *diss.*, 12 A. 129 (F.B.); 15 A. 65 (F.B.), 24 A. 218, 19 C. 780; 27 C. 814; 31 C. 75; 15 M. 29; 15 M. 78; 22 M. 494; 27 B. 380; 11 A. 241 (P.C.), *R.*

(2) S. 4—Plea of limitation not taken below—Claim barred by limitation decreed—Material irregularity whether committed—Punjab Courts Act, 1884, S. 70 (1) (a).

*Where, on a claim barred by limitation being decreed by the Courts below, it was contended that, the plea of limitation not having been taken below, the Courts had not committed a material irregularity in failing to deal with it,

Limitation Act—(Continued).

Held, reversing the decree of the lower appellate Court and remanding the appeal for decision after considering the question of limitation, under S. 70 (1) (b) of the Punjab Courts Act, that S. 4 of the Limitation Act imposes on Courts the duty of considering questions of limitation *sue motu* and acquaintance with the articles and other provisions of the Act is presumed, and that the question of limitation should therefore have been considered. **Bhag Singh v. Dharta Singh**, 27 P.R. 1908=43 P.W.R. 1908=142 P.L.R. 1908.

REID, J.

(3) Ss. 4 and 14—Claim in time. See Act IV of 1899 (Court of Wards), No. 1, 4 M.L.T. 321.

(4) S. 5—"Sufficient cause," meaning of—*Appeal dismissed for default—Mistake of pleader, how far "sufficient cause"*

The true rule as to the exercise of discretion under S. 5 of the Limitation Act is to consider whether, under the special circumstances of each case, the appellant acted under an honest, though mistaken, belief formed with due care and attention.

The words "sufficient cause" in S. 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fides is imputable to the appellant (a)

An appeal was dismissed for default; the appellant applied to have the appeal re-opened, on the ground, that his advocate wrote to him telling him that the date of hearing was the 15th January whereas it really was on the 15th December. And it was further found that the advocate had reason to mistake the date to be the 15th January.

Held, that a fair opportunity must be given to the appellant to prove that he had sufficient cause for his non-appearance, and if such sufficient cause is made out that the appellant would be entitled under S. 558, C.P.C., to have the appeal re-opened. **Nga Po An v. Nga Nyun Bu**, U.B.R. (1907), Third Quarter, Limitation, 1.

SHAW, C.J.

Reference:—(a) 13 M. 269; R and F.

(5) S. 5—*Institution of appeal—Wrong Court—Carelessness or oversight of appellant or pleader—Sufficient cause.*

Limitation Act—(Continued).

Where an appeal from an application for execution of a decree for above Rs. 5,000 and costs was first presented to the Divisional Judge, who had no pecuniary jurisdiction to hear the appeal and who therefore returned the memorandum of appeal for presentation to the proper Court, and where it was subsequently presented to the Chief Court, Punjab, but after the prescribed period of limitation, it was *held* that, in order to enable an appellant to successfully ask for indulgence granted by S. 5, Limitation Act, he must show not only that there was mistake of law, but also that the mistake was made in good faith, i.e., with due care and attention, and that the carelessness or oversight avoidable with due diligence of the pleader, who must have realised that the Divisional Court had no jurisdiction to hear the case, in not presenting the appeal to the proper Court within the prescribed time, was not a sufficient cause within the meaning of S. 5 **Sant Singh v. Qaim**, 118 P.R. 1908.

RATTIGAN AND SHAH DIN, JJ.

References —29 A. 348, 184 P.R. 1889. 66 P.R. 1891, 28 A. 414 A.W.N. (1903), 32; 34 C. 216, 13 M. 269; 10 A. 524, 13 C. 62 30 P.R. 1886, 30 C. 329, 10 A. 587, R

(5-a) S. 5—*Appeal—Civil vacation of September to be observed in Revenue Courts—Combined effect of the notification of the Punjab Chief Court under S. 67 of Act XVII of 1884 and that of the Financial Commissioners under S. 102 of Act XVI of 1887.*

Held, that the combined force of the Notification of the Punjab Chief Court relative to Civil summer vacation under S. 67 of Act XVIII of 1884 and that of the Financial Commissioner in the usual form under S. 102 of Act XVI of 1887 has the effect of making whole of September a holiday for Revenue Courts, although a Revenue Court taking advantage of S. 102 (2) of the latter Act may open for work during September, but this cannot deprive the litigants of the benefit of S. 5 of the Indian Limitation Act (XV of 1877). **Phullu v. Dhanna**, 9 P.W.R. 1908 (Rev.).

JAMES WILSON, F.C.

(6) S. 5—*Depositing appeal memo in the box put up by an appellate Court for the purpose—Proper presentation—Whether sufficient cause for not presenting it within time.* See LIMITATION, No. 3, 71 P.W.R. 1908.

Limitation Act—(Continued).

(7) S. 5—Appeal presented on behalf of deceased party—Legal representative brought on record—Delay. See APPEAL (GENERAL), No 3 (c), 18 M.L.J. 461.

(8) S. 5—See CIV. PRO. CODE, No. 309, 4 N.L.R. 168.

(9) Ss. 5 and 12—Applicability of the sections to the period prescribed by S. 169 of the Companies Act. See ACT VI OF 1882 (COMPANIES), No. 4, 95 P.R. 1908

(10) Ss. 5, 12 and 14—Time necessary for obtaining copy of decree—Conditions under which such time will be excluded—Time during which plaintiff has been prosecuting with due diligence another civil proceeding against defendant—Conditions under which such time will be excluded—"Sufficient cause," meaning of.

In an appeal against a decision dismissing an appeal as time-barred, the facts were that, on the 10th February, 1906, the plaintiff applied for a copy of the judgment and decree. The head copyist of the District Court was told that no decree was necessary, and so, on the 21st February, 1906, he gave her a copy of the judgment and returned to her the requisite stamps for the decree, telling her that a decree was not required. The plaintiff said that she then believed that no decree was necessary and that she took back the stamps. She also said that she did not think it necessary to consult any one on this point, until she went to Rangoon and consulted a firm of advocates there, who told her that a copy of the decree was required. Accordingly, an application was made on the 16th May, 1906, and a copy was supplied on the 17th May. The plaintiff made no application between the 21st February and the 16th May.

Two grounds were taken on the appeal. One was that the time between the 10th February, 1906, when the plaintiff filed an application for a copy of the decree of the District Court, and the 17th May, 1906, when that decree was signed and a copy of it given to her, should be excluded, as time requisite for obtaining a copy of the decree, under S. 12 of the Limitation Act.

Held that the period between the 21st February and the 17th May, 1906, should not be excluded under S. 12 of the Limitation Act, as every would-be appellant should take steps to prosecute his or her appeal with no unnecessary

Limitation Act—(Continued).

delay; that, if the plaintiff had gone promptly to her counsel, she would have been told that a copy of the decree was necessary, but that, where nothing is done for nearly three months, such period was not a period of time requisite for obtaining a copy, and that her application was not pending after the 21st May, as she accepted the word of the copyist and took back the stamps.

The other ground was that the plaintiff had sufficient ground for not presenting the appeal within the time allowed, and so the second paragraph of S. 5 applied. She pleaded that she was entitled, under S. 14, to exclude the time, during which she was prosecuting the appeal in the Chief Court, and that she was misled by her advocates in filing the appeal in that Court.

Held, that she was not entitled to the benefit of S. 14 of the Limitation Act.

S. 14 provides that, in computing the period of limitation prescribed for any suit, the time, during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action, and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.

The true rule is whether, under the special circumstances of each case, the appellant acted under an honest, though mistaken, belief formed with due care and attention. S. 14 of the Limitation Act indicates that the Legislature intended to show indulgence to a party acting *bona fide* under a mistake. S. 5 gives the Courts a discretion, which, in respect of jurisdiction, is to be exercised in the way in which judicial power and discretion ought to be exercised, upon principles which are well understood; the words, "sufficient cause" receiving a liberal construction, so as to advance substantial justice, when no negligence nor inaction nor want of *bona fides* is imputable to the appellant.

When a client *bona fide* accepts the advice of counsel as to the proper procedure to adopt in the course of litigation, and, misled by that advice, fails to file an appeal in time, he is entitled to the benefit of S. 5 of the Limitation Act and should not be visited with the serious penalty, which is involved in the rejection of his

Limitation Act—(Continued).

Held that the essence of S. 14 is that the party, not counsel, must be prosecuting the action with due care and attention and that, on the facts, as disclosed in the affidavits, plaintiff-appellant had not acted with due care and attention, when she filed her appeal in the Chief Court, more especially as she did not acquaint the advocate she consulted at Rangoon with the cause of the previous litigation. **Ma Thein Yin v. Messrs Foucar Brothers and Co.**, 14 Bur. L.R. 344.

HARTNOLL, J.

References :—13 M. 269 ; 34 C 216 and 28 A. 414, F.

(10-a) S. 7—Arrears of profits, suit for, when cause of action arose during minority of plaintiff. See ACT XXII OF 1886 (RENT, OLD), No. 4, 11 O C. 118.

(11) S. 7—*Right of reversioner born after alienation to contest its validity.*

A reversioner, born after an alienation has been made, is, under certain conditions, competent to contest its validity (a), but he can only do so, if the period of limitation had not expired before the date of his birth, and his suit is brought within the period prescribed by law. He cannot, if born after the cause of action has already accrued and time begun to run, claim an extension of time under S. 7. **Umra v. Ghulam**, 22 P.R. 1907=89 P.W.R. 1907=27 P.L.R. 1908.

RATTIGAN AND LAL CHAND, JJ.

References :—29 B. 68, 24 W.R. 7, R., (a) 55 P.R. 1903 (F.B.), R.

(12) Ss. 7 and 8—*Minority of one of several decree-holders—Extension of time.*

Where one of several decree-holders is a minor, he can get an extension of time after the cessation of his disability and he may apply for execution of the whole decree (a) **Sheikh Jamir v. Srimati Lal Bibi**, 7 C.L.J. 308.

* RAMPINI AND SHARFUDDIN, JJ.

References :—(a) 28 C. 465 ; 20 B. 383 ; 22 A. 199, F. ; 25 M. 431, not F.

(12-a) S. 8—See No. 12, *supra*.

(13) S. 10—*Express trust—Trust for a specific purpose—Palla money kept with the bride's father can be recovered at any time.*

The plaintiffs were husband and wife. On the occasion of their betrothal in 1871, a sum of Rs. 366, being the amount of the female

Limitation Act—(Continued).

plaintiff's *palla* or dowry, was made over by the husband's father to the keeping of the wife's father, as a fund constituting her *palla* in accordance with the usual practice prevailing in the caste. This fund having been misappropriated either by the original trustee or after his death by his legal representatives, a suit was instituted against the latter to recover the sum. It was contended in answer that the suit was barred :—

Held, that S. 10 of Limitation Act, 1877, applied to the case, and that it was, therefore, not barred.

A suit to recover trust money is a suit to follow the trust property within the meaning of S. 10 of the Limitation Act, 1877.

S. 10 of the Indian Limitation Act, 1877, requires, as conditions precedent to its applicability, first, that the suit should be against a person in whom property has become vested in trust for a specific purpose or against his legal representatives or assigns, and, secondly, that the suit should be for the purpose of following such property in his or their hands.

The phrase "trust for a specific purpose" in S. 10, is merely a more expanded mode of expressing the same idea as that conveyed by the expression "express trust" of English law. It is used, in the section, in contradistinction to trusts arising by implication of law, trusts resulting, and trusts constructive. **Bhurabhai Jamnadas v. Bai Ruxmani**, 10 Bom. L.R. 540=32 B. 394.

BATCHLOR AND HEATON, JJ.

(14) S. 10, Sch. II, Art. 120—*Heir suing executor for accounts—Executor only liable to render accounts for six years preceding suit—Limitation.* See EXECUTOR, No. 1, 10 Bom. L.R. 117.

(14-a) S. 10. See LIMITATION, No. 5, 10 Bom. L.R. 346.

(15) S. 10, Arts. 134 and 144—*Sale of immovable property of a Religious Institution by its Mahant—Suit to recover it by his successor—Trustee.*

Held, by the Full Bench of three Judges, that (1) in the Punjab a Mahant or other similar head of a Religious Institution is the trustee for the property under his control as Mahant, within the meaning of Art. 134, Indian Limitation Act, XV of 1877 ; that (2) a suit to recover possession of such property alienated for value

Limitation Act—(Continued).

by a Mahant in excess of his powers and in violation of the trust must be brought within twelve years of the date of alienation; and that (3) if such a suit is brought by the successor of the Mahant who made the alienation, limitation as against him, runs not from the date of his appointment but from the date of his alienation.

Held, also, that the said article is not restricted in its application to purchasers in good faith, but applied equally to an alienation from a trustee for value even if he takes the property with full knowledge that the alienor is acting in excess of his powers (a). **Mahant Har Gian Dev v. Baldeo Dass**, 123 P.W.R. 1908 (F.B.).

CLARK, G.J., CHATTERJI AND RAITIGAN, JJ.

References —(a) Civ. App. No. 48 of 1896 decided on the 19th July, 1898, by Chatterji and Anderson, JJ. (see 35 P.W.R. 1908=30 P.R. 1908), *diss.*; 89 P.R. 1901 and 3 P.R. 1902, R; 20 A. 482 (F.B.); 14 B. 458, 27 B. 363, 373 and 509, respectively, F., 23 C. 536, 31 C. 314, 33 C. 511; 2 C.L.J. 547, 13 M. 277, 24 M. 471 and 9 M.L.J. 93, F.

(16) S. 12—*Computation of period of limitation prescribed for appeal—Time requisite for obtaining copy of decree and judgment to be excluded*

Under S. 12 of the Limitation Act, the time requisite for obtaining a copy of the decree must be excluded in computing the period of limitation prescribed for an appeal, and, also, the time requisite for obtaining a copy of the judgment, on which it is founded must be excluded (a). **Ma Thein yin v. Foucar Brothers & Co., Ltd**, 14 Bur. L.R. 8.

HARTNOLL AND MOORE, JJ.

Reference —(a) 11 Bur. L.R. 220=3 L.B.R. 62, F.

(16-a) S. 12. See Nos. 9 and 10, *supra*.

(17) S. 14—"Unable to entertain" and "unable to decide," distinction between—"Some other cause of the like nature," what is—*Act XIV of 1859—Non-suit—Misjoinder of parties and causes of action—"Prosecuted with due diligence."*

A plaintiff cannot be said to have prosecuted a suit with due diligence within the meaning of S. 14 of the Limitation Act (XV of 1877), when, owing to his own negligence or default, the suit is so framed that the Court cannot try it out on the merits.

Limitation Act—(Continued).

An improper joinder of parties or of causes of action is not "a cause of a like nature" contemplated to fall within the meaning of S. 14 (a). **The Indian Publishers v. Samuel Charles Aldrige**, 12 C.W.N. 473=35 C. 728.

MACLEAN, C.J., HARRINGTON AND FLETCHER, JJ.

References —(a) G.W.R. 184, 10 B. 604, F.; 10 C. 86; 22 A. 248, *diss.*; 23 C. 821; 22 M. 494, D

(18) S. 14—*Period during which right to sue is suspended, whether allowable.*

An issue was raised between co-defendants in a suit. One of them got judgment in his favour, which however was reversed on appeal. Then the unsuccessful respondent filed a suit against the successful appellant.

Held that the plaintiff is entitled to deduct the period, during which there was a judgment of the lower Court in his favour (a).

A Court of justice ought to relieve parties against the injustice occasioned by its own acts or oversights at the instance of the party, against whom the relief is sought. **Lakhan Chandra Sen v. Madhu Sudan Sen**, 7 C.L.J. 59=3 M.L.T. 90=12 C.W.N. 326=35 C. 209.

MACLEAN, C.J., HARRINGTON AND FLETCHER, JJ.

References —(a) 12 M.L.A. 244, 7 M.L.A. 323 (357), F

(19) S. 14—*Plaint filed within limitation period—Leave to institute it obtained from Registrar—Withdrawn by leave—Fresh suit instituted—S. 374, C.P.C., no bar to fresh suit—Suit not barred under section. See Civ. Pro. Code, No. 234, 12 C.W.N. 921.*

(19-a) S. 14. See Nos. 3 and 10, *supra*.

(20) S. 15, *Sch. II, Art. 84—Attorney and client—Suit for costs—Limitation—Order for taxation of costs, effect of.*

A suit by an attorney for the recovery of his costs falls under Art. 84 of the Limitation Act; and an order of the Court for the taxation of his costs has not the effect, under S. 15 of the Act, of staying the institution of the suit by him against his client.

Per HARRINGTON, J.—All the authorities show that the taxation of costs is not a condition which must be performed before an action on an attorney's bill may be brought. If that is

Limitation Act—(Continued).

so, an order for taxation cannot affect the plaintiff's right to bring his action. **Makham Lal Mukerjee v. Nalin Chandra Gupta**, 35 C. 171.

MACLEAN, C.J., HARRINGTON AND FLETCHER, JJ.

- (21) *S. 19—Contract Act (IX of 1872), S. 25—Agreement to pay a barred debt—Express contract—Consideration valid.*

Defendant executed a *Sarkhat* in favour of plaintiff's firm, in respect of a barred debt due by him to the firm, stating that no interest was to be paid. *Held*, that in order to maintain the suit, it was necessary to show express promise to pay, and not merely that the intention to pay was deducible from the language of the acknowledgment. *Held*, further that to hold that whenever there was a clear acknowledgment of a debt whether time-barred or not, that was equivalent to a promise to pay upon which a suit might be maintained, would be to nullify the effect of S. 19 of the Limitation Act (a). *Held*, further that under S. 25 (3) of the Indian Contract Act, a promise, made in writing, and signed by the person to be charged therewith to pay a barred debt was a good consideration, but there must be a distinct promise and not a mere acknowledgment. **Gobind Das v. Sarju Das**, 5 A.L.J. 274 = A.W.N. (1908), 129 = 30 A. 268

AIKMAN AND KARAMAT HUSAIN, JJ.

Reference —(a) 23 C 1047 (1058), *D.*

- (22) *S. 19—Acknowledgment—Essentials* of a valid acknowledgment—Acknowledgment contained in a written statement*

There is nothing in the language of S. 19 of the Limitation Act, 1877, to justify the narrow interpretation that an acknowledgment under the section must be addressed to the creditor or some one on his behalf.

An acknowledgment contained in an application by the judgment-debtor by way of a written statement, wherein he said that he was unable to pay the amount then, but would pay if time were given him, is a valid acknowledgment.

A statement in the course of a written statement by the judgment-debtor, that, "I have asked the plaintiff by a written notice to take away the sum from a third party with whom I have deposited that sum," amounts to a valid

Limitation Act—(Continued).

acknowledgment. **Shrinivas Krishna Shiralkar v. Narhar Khando Khanvilkar**, 10 Bom. L.R. 374 = 32 B. 296.

CHANDAVARKAR AND KNIGHT, JJ.

- (23) *S. 19—Acknowledgment—Mortgagor narrating the relationship of mortgagor and mortgagee—Mortgagee admitting its correctness by signature—Effect of the writing.*

Where a mortgagor describes his mortgagee as such and the latter admits in writing over his signature the correctness of that description, the meaning of the admission is as plain as language can make it. Thereby the mortgagee unmistakably affirms that he is what he is described to be, a mortgagee, and it is a necessary implication from the admission that he acknowledges all the legal consequences of his position as a mortgagee, one of which is his liability to be redeemed.

It is immaterial for the purposes of S. 19 of the Indian Limitation Act, in what connection, or for what purpose, the description was made by the mortgagor and admitted as correct by the mortgagee,--whether it was or not made in a document which had nothing to do either directly or indirectly with the mortgage. The sole question is whether the writing, whatever its immediate purpose or occasion, contains an acknowledgment of the liability in dispute. **Sheikh Mahomed v. Jamal-ud-din Mahomed**, 10 Bom. L. R. 385

CHANDAVARKAR AND KNIGHT, JJ.

- (24) *S. 19—Acknowledgment—Natural guardian—Computation of limitation—Fresh start.*

Held, Bawerji and Richards, JJ. (Stanley, C.J., dissenting) that when a natural guardian acknowledges a debt, such acknowledgment is by an 'agent duly authorised in this behalf' within the meaning of S. 19 of the Limitation Act and gives a fresh start for the computation of limitation against the minor (a)

Held, Stanley, C.J., that the relation between a guardian and ward is not that of an agent to a principal, but that of a trustee to a *cesti que trust*. A guardian is not competent to acknowledge a debt due from a minor so as to give a fresh start to the computation of limitation.

The difference between the manager of a Hindu family and a natural guardian of a minor pointed out. **Ramcharan Das v. Gaya**

Limitation Act—(Continued).

Prasad, 5 A.L.J. 375 (F.B.)=A.W.N. (1908), 175=30 A. 422=4 M.L.T. 49.

STANLEY, C.J., AND BANERJI AND RICHARDS, JJ. 1.

References:—(a) 26 A. 598, *not H.*; 5 M. 169, 17 M. 221; 18 M. 456; 26 M. 330; 26 B. 221; 29 C. 647, 17 A. 198; A.W.N. (1888), 187, and 11 H.L.C. 115, *R.*

(25) S. 19—Suit for redemption of mortgage—Limitation—Acknowledgment of mortgagor's right to redeem

Held, that in order that an acknowledgment by a mortgagee of the mortgagor's right to redeem should be a good acknowledgment within the meaning of section 19 of the Indian Limitation Act, 1877, for the purpose of saving limitation it is not necessary that such acknowledgment should be addressed specifically to the mortgagor. **Lachmi Chand v Allah Dia**, A.W.N. (1908), 226.

KARAMAT HUSAIN, J.

References:—33 C. 1047; 1 A. 117, and 16 M. 366, *R.*; 14 C. 801, and 33 C. 613, *not full.*

(26) S. 19—Contract Act, S. 25 (3)—Suit on balance of account—Acknowledgment—Fresh promise to pay barred debt.

In this case plaintiff sued to recover principal and interest due from defendant. The question was whether the claim was within time. It was contended on behalf of the plaintiff that the suit was not barred by limitation for two reasons:—(a) because the debt had, from time to time, been duly acknowledged, at first by defendant's agents, and subsequently, by defendant herself, each acknowledgment being within limitation, and the debt being thus kept alive under the provisions of S. 19 of the Act, and (b) because, in any event, the entries in plaintiff's books, dated 7th *Jeth*, 1956 and 27th *Baisakh*, 1959, which were said to be attested by defendant herself, whose thumb impressions were alleged to be at the foot of these entries amounted to an agreement to pay the monies within the meaning, and for the purposes, of S. 25 (3) of the Contract Act, 1872.

Held, that, inasmuch as the earlier acknowledgments were not proved to have been made with the defendant's authority, the later entries, attested by the defendant herself, could not save limitation under S. 19 of the Act, as they were made after the expiry of the period of limitation prescribed by the Act.

Limitation Act—(Continued).

Held on the second point, that the entries were mere balances struck and acknowledgment of an existing debt, and at the utmost they amounted to an acknowledgment of the amounts found to be due at the time, and that they could not be construed as a new agreement between the parties within the meaning of S. 25 (3) of the Contract Act. **Shankar Das v. Jasodhan**, 102 P.R. 1908.

CLARK, C.J., AND RATTIGAN, J.

References:—102 P.R. 1905, 8 B. 405; 72 P.R. 1879, *R.*

(27) S. 19—Claim for balance struck and admitted—Acknowledgment of liability—No promise to pay—Fresh cause of action

The plaintiffs sued the defendants, alleged to be members of a joint Hindu family, for recovery of a debt, contracted for the benefit of the joint family and due on a book account. On 1st January, 1903, A for himself and as agent for B and C, his own father and brother, whose heirs the defendants were, struck a balance of a certain amount on account of previous debts in the plaintiffs' *bahr* in his own handwriting. The defendants contended, *inter alia*, that the plaintiffs' suit was not maintainable on the balance of 1st January, 1903, which was merely evidence of the original dealings between the parties and did not of itself constitute a fresh cause of action.

Held, on a construction of the entry sued upon, that no suit could be founded upon it, as it amounted to a mere acknowledgment of liability in respect of an existing debt and did not import a promise to pay the same, so as to constitute a fresh cause of action independently of the debts on which the balance was based. **Pala Mal v. Tulla Ram**, 119 P.R. 1908.

RATTIGAN AND SHAH DIN, JJ.

References:—8 B. 405 and 68 P.R. 1904, referring to 3 P.R. 1878, *F.*; 102 P.R. 1905, *R.*; 35 P.R. 1903, *D.*

(28) S. 19—Applicability of section to the absolute prohibition against the granting of an application after twelve years from certain dates imposed by S. 230, Civ. Pro. Code. See EXECUTION OF DECREE, No. 18, 11 O.C. 220.

(29) S. 20—Part-payment of the principal of the debt—Endorsement relied on to save limitation, not in debtor's handwriting—Debtor putting his signature to endorsement

Limitation Act—(Continued).

—Whether such signature will save limitation, when debtor can write.

Where it has been distinctly found and is admitted that the debtor can write, it is impossible to hold that an endorsement written by another person and signed only by the debtor is an endorsement which is, as far as was possible, in his handwriting, and, therefore, which is sufficient, under the proviso to S. 20 of the Limitation Act, to create a new period of limitation. **Santishwar Mahanta v. Lakhikanta Mahanta**, 35 G. 818.

BRETT AND COXE, JJ.

References.—23 C. 546, R.; 7 M. 55 and 76 and 28 B. 262, D.

(30) S. 20-A—Payment towards interest—Evidence.

In order to be entitled to the benefits conferred by S. 20-A of the Act, the plaintiff must give satisfactory evidence that a payment made before the prescribed period, was specifically appropriated to interest; a general payment is not sufficient. **Jethanand Topandas v. Lalamal Sitalmal**, 1 S.L.R. 252

KNIGHT AND CROUCH, A.J.Cs

Reference —5 Bom. L.R. 350, F.

(31) S. 22—Pre-emption-suit—Assignment by vendee pending the suit—Assignee added as co-defendant after limitation for suit expired, effect of.

S. 22, Limitation Act, does not apply, where the added defendant derives his title from the original defendant, by an assignment pending the suit. The words "when a new plaintiff added after the institution of the suit," in S. 22 mean a person, who claims in his own right. But when the interest set up by the added party is only derivative, acquired pending the suit, then he is not a new defendant or plaintiff, and the case is one merely of continuation of the original suit with leave of Court under S. 372, Civ. Pro. Code, without any change in the date of its institution. A suit for pre-emption, therefore, is not barred by limitation, by reason of a person deriving title from the vendee-defendant, after the institution of plaintiff's suit, having been joined as a co-defendant, after the expiry of the stipulated period. **Fatfeh Muhammad v. Said Ahmad**, 3 P.R. 1907=3 P.L.R. 1908.

LAL CHAND, J.

References.—5 C. 730; 23 A. 331; 68 P.R. 1879; 7 P.R. 1906, R.; 25 P.R. 1908; 25 C. 409, D.

Limitation Act—(Continued).

(32) S. 22—Addition of party by Court after period of limitation—Effect—Civil Procedure Code (Act XIV of 1882), S. 32.

When, in a suit, a person is added as a party-defendant, at the instance of the Court, after the period of limitation applicable to the suit has expired, S. 22 of the Limitation Act applies and bars the plaintiff's remedy as against the added defendant (a). **Ramkinkar Biswas v. Akhil Chandra Choudhuri**, 11 C.W.N. 350 (F.B.)=5 C.L.J. 242=2 M.L.T. 137=35 C. 519.

MACLEAN, C.J., HARRINGTON, BRETT, MITRA AND GELDT, JJ.

References.—24 C. 640, 4 C.W.N. 459=27 C. 540, overruled, 12 C. 642, explained, 10 C.W.N. 551=3 C.L.J. 576, approved

(33) S. 22—Added plaintiff—Pro forma defendant joined as plaintiff.

Where a person, who was at the institution of a suit made a *pro forma* defendant, is subsequently joined as a plaintiff, S. 22 of the Limitation Act does not apply. In such a case the added plaintiff is not a "new plaintiff" (a). **Nagendrabala Debye v. Tarapada Acharjee and another**, 8 C.L.J. 286.

STEPHEN AND HOLMWOOD, JJ.

References.—(a) 5 C.L.J. 486, 34 C. 612 and 35 C. 519, D.

(34) S. 22—Suit by some of the co-owners of a joint Hindu family for rent—Addition of other parties after the period of limitation—Claim, joint and indivisible—Effect. See Civ. Pro. Code, No. 14, 7 C.L.J. 251.

(35) S. 23—Suit for declaration of right to take water and of injunction to remove obstruction—Applicability of Arts. 120 and 141, Sch. II—Continuing wrong.

In a suit for a declaration that the plaintiffs, as reversioners of a widow who died within twelve years of suit within the meaning of Art. 141, Sch. II of the Limitation Act, had a right to take water for the use of their gardens from a canal which was under the control of the defendants, and for an injunction ordering the demolishing of a dam constructed more than twelve years before the suit for obstructing the flow of water.

Held, on appeal that the suit was within time, under Art. 120 of the second schedule, read with S. 23 of the Limitation Act as the wrong was a continuous one. It was also

Limitation Act—(Continued).

pointed out that Art. 141 of Sch. II had no application to the suit as it was merely for declaration and injunction and not for possession. **Goverdhandas v. Naraindas**, 1 Sind L.R. 238.

HAYWARD, A.J.C.

(36) *S. 23—Arts. 120, 142 and 144—Court Fee—Revision—Religious institution—Suit for removal of Mutwali and Imam of a mosque—Power of congregation of a mosque as regards removal of mutwali—Change of religion—Sufficient cause—Cause of action when to arise—Not continuing wrong—Indian Court Fees Act VII of 1870, S. 7 IV (c)—Specific Relief Act I of 1877, S. 42—Punjab Courts Act XVIII of 1884 (as amended by Act XXV of 1899), S. 70 (b).*

A suit was brought against M, the mutwali and imam of a mosque, by some persons on behalf of the general body of worshippers, on the allegation that although the mosque belonged to the Hanafi sect, M had changed his religious views and turned a follower of the Mirza of Quadian, four years before suit, and that therefore was disqualified from discharging his duties. The reliefs sought were —

- (a) That the defendant be declared unfit for the office of Imam of the Masjid;
- (b) That he be ejected from the property appertaining to the Masjid, and
- (c) That he be dismissed from the office of mutwali.

Held, (1) That, since the plaintiffs simply seek the removal of the defendant from the office of mutwali, which would involve his ejection from the immoveable property of which he was in possession in that capacity, and do not seek possession of the property for themselves full stamp need not be levied upon the value of the said property (a).

(2) That, it having been found concurrently by both the lower Courts that M had turned a follower of the Mirza of Quadian in 1891 and not four years before suit as alleged in the plaint, the chief Court has no power under S. 70 (b) of the Punjab Courts Act to question that finding on revision.

(3) That the suit was barred by limitation, under Art. 120 of the Limitation Act, having been instituted more than six years after M's change of religion in 1891 when the cause of action accrued. Neither Art. 142 nor 144 has any application to the case.

Limitation Act—(Continued).

(4) That such change and the subsequent persistent adherence to such newly adopted views cannot properly be described as a continuing change amounting to a continuing wrong such as is contemplated by the terms of S. 23 of the Indian Limitation Act, and that the plaintiff should have come to Court within six years under Art. 120 of the Act, since the time when the alleged change in views occurred (b).

5) That the general body of worshippers have no right to remove a Mutwali and Imam at their will and pleasure without assigning and establishing sufficient cause for such removal. **Mir Yad Ali v. Mouli Mubarak Ali**, 37 P W R 1908.

RATTIGAN AND SHAH DIN, JJ.

References —(a) 56 P R 1896, followed. (b) 19 C 776, and 26 M. 113, cited and approved.

(37) S. 26, cl. (2)—Claim to take plough and water through another's land—No allegation of severance—Claim can be based only on this section. See EASEMENT, No. 3, 4 L.B.R. 246.

(38) S. 26 and Art. 47, Sch. II—Upper riparian owner can acquire easement to irrigate his land apart from mode stated in S. 26—Art. 47 does not apply to suit for declaration of plaintiff's right to put up dams in river. See EASEMENTS. No. 5, 35 C. 851

(39) Arts. 6, 68 and 115—Suit for recovery of penalty under Madras Local Boards Act. See ACT V OF 1884 (LOCAL BOARDS, MADRAS), No. 3, 17 M.L.J. 537.

(40) *Art. 10—Execution of decree—Sale—S. 316, C.P.C., 1882, sale-certificate granted under—Ss. 51 and 89, Registration Act, 1877—Copy of sale-certificate registered under S. 89, Registration Act—Effect.*

A sale-certificate granted under S. 316, C.P.C. of which a copy has been forwarded to the registering officer in accordance with S. 89, Registration Act, and duly filed in register of non-testamentary documents relating to immoveable property prescribed in S. 51 of the Act by the registering officer, is not a registered document within the meaning of Art. 10, Limitation Act. **Fattah Singh v. Daropadi**, 142 P R. 1908 (F.B.).

REID, C.J., ROBERTSON AND RATTIGAN, JJ.

(41) Art. 10—Suit by pre-emptor against transferees—Article applicable. See PRE-EMPTION, No. 13, 106 P.R. 1907 = 75 P.L.R. 1908.

Limitation Act—(Continued).

- (42) *Sch. II, Art. 10—Limitation—Pre-emption suit—Property in suit in possession of tenant—Property capable of physical possession.*

Held, that property in the possession of tenants cannot be said to be capable of physical possession within the meaning of Art. 10 of the second schedule of the Limitation Act (a) **Ghulam Mustafa v Shahab-ud-din Khan**, 63 P.L.R. 1908 (F.B.) = 1 P.W.R. 1908 = 49 P.R. 1908

CLARK, C.J., REID AND CHAFFEIRI, JJ

References.—(a) 88 P.R. 1905; 179 P.L.R. 1905, explained, 24 A. 18 (P.C.); 16 P.R. 1902, 73 P.R. 1885, 48 P.R. 1884, F

- (43) *Art. 11—Dismissal of application under S. 278 of Civ. Pro. Code for default—Order made without investigation—Applicability of the article*

When an application under S. 278 of the Civ. Pro. Code is dismissed for default, it is impossible to hold that there has been an investigation on the merits so as to satisfy the test which Art. 11 of the Limitation Act requires. To such a case the article, therefore, does not apply. **Saraba Subba Rao v. Kanisala Thinamayya**, 17 M.L.J. 554—3 M.L.T. 106 = 31 M. 5.

WHITE, C.J., AND MILLER, J.

References.—29 M. 225, 1 C.W.N. 24; 11 C.W.N. 487, F.

(44) *Art. 11—Decree—Execution—Resistance to possession—Obstruction by manager of joint Hindu family—Miscellaneous proceedings following obstruction—Withdrawal by manager from such proceedings—Whether withdrawal binding on plaintiffs under article. See Civ. Pro. Code, No. 222, 10 Bom. L.R. 550.*

- (45) *Sch. II, Art. 11—Application of—Suit by person against whom order under section 335, Civ. Pro. Code, is made—Adding strangers as parties to the suit after period of limitation has expired.*

The period of limitation prescribed by Art. 11 of the second schedule of the Limitation Act (XV of 1877) (= Art. 11 of Act IX of 1908) for suits under S. 335 of the Code of Civil Procedure, 1882, applies only in so far as it is against the person in whose favour the order was made.

Hence, the fact that other persons also were, after the period of limitation, added as parties

Limitation Act—(Continued).

to the suit, on the representation of the person in whose favour the order was made that he was only a benamidar for the parties so added, will not bar the suit. **Aiyam Chetti v. Poongavanam**, 18 M.L.J. 464.

WALLIS AND MUNRO, JJ.

(46) *Sch. II, Arts. 12, 91, 144—Suit for possession of property mortgaged and sold during minority—Minor—Limitation. See GUARDIAN AND MINOR, No. 6, 11 O.C. 346*

- (47) *Sch. II, Arts. 13 and 14—Civ. Pro. Code (Act XIV of 1882), S. 332—Suit under S. 332 brought more than a year after the order passed under the section, not barred.*

On the 21st November, 1900, an order was passed, under S. 332 of the Civil Procedure Code, awarding possession of certain property to defendants. The plaintiffs filed this suit on the 25th August, 1905, under S. 332 of the Code, to recover possession of the property from defendants. The suit was dismissed, as having been barred under Art. 14 of the Limitation Act—

Held, (1) that the suit was not barred under Art. 14 of the Limitation Act, 1877. An order passed by a Judge, under S. 332 of the Civ. Pro. Code, 1882, is not such an act or order as is referred to in Art. 14. A Judge exercising his judicial functions is a Civil Court within the meaning of the Limitation Act and is not an officer of Government acting in his official capacity within the meaning of Art. 14.

Held, (2) that Art. 13 of the Act also did not apply to the case, because an order passed under S. 332 restoring possession, which has been given in execution of a decree, is an order made by the Court in execution proceedings, and is not an order of a Civil Court in a proceeding other than a suit (a). **Govinda Bala v. Ganu Abaji**, 10 Bom. L.R. 749

SCOTT, C.J., AND HEATON, J.

Reference.—(a) 8 M. 82, F.

- (48) *Sch. II, Arts. 14, 121—Noabad taluk, incident of.*

Article 14 refers to orders and proceedings of a functionary to which by law is given a particular effect in favour of one person or against another, subject, in the regular course, to a further judicial proceeding having for its object to quash them or set them aside (a).

The article has no application where an order is null and void and does not affect the

Limitation Act—(Continued).

plaintiff's interest, so that there is no occasion to set it aside (b).

Where subsequent to the purchase of an entire Noabad mehal at a sale for arrears of revenue by the plaintiff, the term of the taluk expired and Government resettled the taluk in favour of the defaulting proprietors, and the plaintiff instituted a suit for recovery of possession of a parcel of land included in the taluk purchased,

Held, that the rule of limitation applicable was that embodied in Article 121 and not in Article 14.

A Noabad taluk is not necessarily temporarily settled; it may be a permanently settled one. The re-settlement of a Noabad taluk does not necessarily mean a settlement with new talukdars; it may be an adjutment of the revenue and nothing more (c). **Maqbul Ahmad v. Hara Gobinda Kalal**, 8 C.L.J. 470

MOOREHEAD, J.

References—(a) 11 B 429, P (b) 21 C 626 25 C 179 (P C.). 24 A 467, R. (c) 26 C 792, R

(48-a) Art. 14—See No. 47, *supra*.

(49) *Sch. II, Art. 29—Wrongful seizure of moveable property under legal process—Starting point of limitation—Suit for compensation for improper attachment—Jurisdiction of Small Cause Courts*

A suit for compensation for improper attachment is not excluded from the jurisdiction of a Presidency Small Cause Court. Such a suit is however excluded from the jurisdiction of a Provincial Small Cause Court by Art. 35 (j) of the Schedule to Act IX of 1887 (a).

Art. 29 of the Limitation Act is quite general in its terms and was intended to apply to all cases of wrongful seizure of moveable property, made under legal process.

The point from which limitation begins to run is from the date of seizure of the property, and the period of limitation prescribed is not affected by the fact that the plaintiff objected to the attachment under S. 278, C.P.C., even if the objection proceedings outlasted that period.

In a case like that, the cause of action is complete as soon as the wrongful seizure is made and the subsequent detention is the act of the Court and nominal damages at least are at once recoverable (b).

Limitation Act—(Continued).

If there are two articles of the limitation schedule which may possibly govern a case, the one more general and the other more particular and specific, the more particular and specific article ought to be regarded as the one governing the case (c). **Nagoba v. Madholala Kalar** 4 N.L.R. 49.

DRAKE-BROCKMAN, J.C.

References:—(a) 24 C. 163; 25 M. 540, 24 M. 339, P. (b) 19 W R. 289 (341); 3 B. 74 (78); 25 M. 540, 29 A. 615, R. (c) 16 C. 25; 21 M. 141; 23 B. 725, 26 C. 564; 26 B. 430, R.

(50) *Arts. 29, 36, 49, 62 and 120—Attachment—Wrongful seizure through Court of moveable property—Property sold and proceeds distributed—Suit for recovery of money paid—Limitation, whether suit barred by—Civ. Pro. Code, S. 283*

A suit was instituted on the 1st June, 1903, to recover the value of the paddy crops belonging to the plaintiff attached by defendants 1, 2 and 3 before judgment, in a suit brought by them against the fifth defendant, and sold on the 10th April, 1900 to satisfy the decree obtained in that suit. The proceeds of the sale were distributed among the defendants on the 15th May, 1900. The plaintiff presented a claim petition when the property was attached, which was dismissed on the 8th March, 1900. He sued to declare his title on the 26th March, 1900, and he obtained his final decree declaring his title on the 7th February, 1903. It was contended that Art. 29, Limitation Act, applied and that the suit was barred, not having been brought within one year from the date of the attachment.

Held by the Full Bench (Sankaran Nair, J., dissenting) that the original wrongful seizure was the cause of action and time began to run from that date, that, whether the article of the Limitation Act that governed the case was 29 or 49 the suit was admittedly barred, and that no allowance of time is made for the time spent in litigating the title, under S. 283, Civ. Pro. Code.

Held per Arnold White, C.J., that the appropriate article was Art. 29, since this was the only article which referred specifically to wrongful seizure under legal process, and that Art. 29 is not restricted in its application to cases of consequential damage, but applies also to the case where the value of the property itself is sought to be recovered; *held* further that the

Limitation Act—(Continued).

distinction between Art. 29 and Art. 49 was that the former article applied to a case of wrongful seizure made under *legal process*, whereas the latter applied when the wrongful seizure was made by a private person (a).

Held per Sankaran Nair, J., that, so long as the property remained in the custody of the Court, the plaintiff could not be said to have lost it and was not, therefore, entitled to any compensation for its loss, and Art. 29 of the Limitation Act did not therefore apply, nor did Art. 49 apply; as the suit was not for any specific moveable property and the defendants had not wrongfully taken, injured, or detained the property. The article that applied, therefore, was either Art. 62 or Art. 120, and in either case the suit was not barred (b) **Damaraju Narasimha Rau v. Thadinada Gangaram**, 4 M.L.T. 271

ARNOLD WHITE, C.J., SANKARAN NAIR, AND
PINNEY, JJ.

References.—(a) 23 M. 621, F., 29 M. 46, R.; 30 M. 12, D. and 8 B. 19, *relied on*. (b) 22 M. 478 and 23 M. 621, R.; 30 C. 440 and 8 B. 19, *relied on*.

(50-a) *Sch. II, Art. 32—Limitation for removal of trees newly planted by a grove-holder.*

A suit for removal of trees newly planted by a grove-holder is governed by Art. 32. (a) **Manohar Nath v. Raghubans Lal**, 11 O.C. 379.

PIGOTT, J.C.

References.—(a) 24 C. 160; 9 O.C. 109, R. and 10 A. 634, D.

(51) *Arts. 32 and 120—Suit by co-owners for establishing a right of way—Limitation.*

Where the parties in a suit to restrain the obstruction of a joint way were co-owners of the land in question and not landlords, *held* that Art. 120 of the Limitation Act applied, and not Art. 32.

Propriety of granting injunction in a particular case considered. **Cherukuru Musaly v. Cherukuru Lakshumayya**, 4 M.L.T. 278.

BODDAM AND MUNRO, JJ.

References.—24 C. 160 and 26 C. 564, R. and D.

(51-a) Art. 36—See No. 50, *supra*.

(52) *Sch. II, Arts. 36, 39 and 40—Fictitious landlord and tenant—Distraint—Removal of crop—Suit for damages—Trespass Conversion.*

Limitation Act—(Continued).

Where it was found that the defendant had set up a fictitious landlord and a fictitious tenant in respect of the plaintiff's holding, and having obtained a process for distraint from Court, caused the standing crops on the holding to be distrained and subsequently cut and removed them;

Held (Per RAMPINI, C.J. and GEHDT, J.)—that the plaintiff's suit for damages in respect of the above acts of the defendant fell within Art. 36 of the second schedule of the Limitation Act (a).

Per DOSS, J. (*contra*)—That so far as the defendant wrongfully entered on the land, the suit was governed by Art. 39; and in regard to the removal of the crop after it was cut, the suit was governed by Art. 49 of the second schedule of the Limitation Act. **Sripati Sarkar v. Hari Kar**, 12 C.W.N. 1090

RAMPINI, C.J., AND GEHDT AND DOSS, JJ.

References.—(a) 9 C.W.N. 376, F.; 2 C.W.N. 265 = 25 C. 692, R.

(52-a) Art. 39—See No. 52, *supra*.

(53) *Sch. II, Art. 44—Limitation—Minor—Suit for possession of immovable property—Muhammadan Law—Transfer by de facto, but not legal, guardian*

An alienation by a *de facto* guardian, who is not legal guardian of the minor and is not authorised by custom to transfer his ward's property, is void, and the suit brought by the minor, after attaining majority, for possession of immovable property, against the transferee from such guardian, is not governed by Art. 44 of the second schedule of the Limitation Act; for it is not necessary for the minor to have the alienation set aside. **Sardar Shah v. Haji**, 182 P.L.R. 1908

CLARK, C.J.

(54) Arts. 44 and 144—Suit for redemption brought by a minor twelve years after mortgage—Mortgage by one not legally competent to do so—Limitation. See MAHOMEDAN LAW (GENERAL), No. 1, 11 O.C. 1.

(55) *Sch. II, Arts. 44 and 144—Joint Hindu family, guardian of a member belonging to—Transfer by mother purporting to act as guardian—Suit for possession brought by a minor to recover property alienated without necessity, limitation for.*

Limitation Act—(Continued).

Held, that, in a joint Hindu family, the mother of a minor cannot be considered to be the legal guardian of the minor.

Held, further, that where a member of a joint Hindu family brings a suit for recovery of possession of the property alienated during his minority by his mother professing to act as his guardian, within twelve years from the date of transfer, but more than three years from the date of attaining majority, the suit is not barred under Art. 44, Sch. II of the Limitation Act but is governed by Art 144. **Satrohan Singh v. Rajahindar Bikram Singh**, 10 O.C. 367.

* SANDERS AND GIBBEVEN, J C.S.

Reference—(a) 25 A 407 (F C), F., 5 O.C. 197; 33 C. 257, R and F

(56) *Sch. II, Art 45 Alluvial accretion—Settlement of khas mahal land—Suit to set aside an order refusing settlement—Reg. IX of 1845.*

A suit to set aside an order of the Commissioner refusing to make a settlement of khas mahal land with the plaintiff who claimed settlement of it as an accretion to his jote is governed by Art. 45 of Sch II of the Limitation Act and not by Art 14. **Abdul Kadir v. Hamdu Miah**, 12 C.W.N. 910.

STEPHEN AND HOLMWOOD, JJ.

(57) *Sch. II, Art 47—Suit to recover property, the subject of order under S. 145, Crim. Pro. Code—Limitation—Starting point—Rule issued by High Court against Magistrate's order—"Final order."*

• For a suit to recover property in respect of which an order under S. 145 of the Crim. Pro. Code has been made, the period of limitation runs from the date of the order of the Magistrate and not from the date on which a rule issued by the High Court under S. 15 of the Charter Act against the Magistrate's order was finally disposed of. **Jagannath Marwari v. Ondal Coal Co., Ltd.**, 12 C.W.N. 840.

RAMPINI AND SHARFUDDIN, JJ.

(57-a) Art. 47—See No. 38, *supra*.

(58) *Sch. II, Art. 49—Government promissory notes held by defendant for plaintiff—Wrongful disposal of notes—Pledge—Subsequent demand and refusal—Wrongful detention when commences.*

The defendant who held certain Government promissory notes in trust for the plaintiff,

Limitation Act—(Continued).

pledged the same for his own purposes, and later on when asked by the plaintiff refused to deliver them up.

Held, that a suit by the plaintiff to recover the notes or their value from the defendant was governed by Art. 49 of Sch. II of the Limitation Act, and time commenced running from the date of refusal, notwithstanding that the defendant had wrongfully parted with the notes before that date.

The detention of the notes became wrongful from the date of refusal to deliver them up (a). **Gopal Chandra Bose v. Surendra Nath Dutt**, 12 C.W.N. 1010

COXE AND DOSE, JJ.

Reference —(a) L.R. 6 C P. 206, F.

(58-a) Art. 49—See Nos 50 and 52, *supra*.

(59) *Arts. 49 and 120—Possession, when becomes wrongful—Possession, claimed to be bona fide subsequently declared by Court to be wrongful from commencement.*

Defendant claimed to be in possession of certain moveables *bona fide*, subsequently the Court declared, that such detention was wrongful. The present suit was more than three years from the time possession was taken but within 2 years from the time when the Court declared the detention to be unlawful. *Held*, the article applicable was 49 but not 120 of Limitation Act, because the detention was in fact wrongful from the beginning though declared by the Court to be so on a later date. **Arunachalam Pkilai v. Alagiamambia Pillai**, 3 M.L.T. 324.

BENSON, J.

Reference —21 C. 157, D.

(60) *Art 62—Undivided Hindu family—Mitakshara Law—Realisation of debt due to the family—Unrealized debts left undivided at partition and subsequently realised by one member of the separated family—Claim of other members.*

Where one member of a joint Hindu family realises money due to the family the relation between him and the other members is not that of agent and principal but much more like that of trustee and *cestuis que trustent* (a). So long as the family was joint it could not be said that any part of its property belonged to one member more than to another. Other members cannot bring a suit contemplated by Art. 62, against him (b).

Limitation Act—(Continued).

A suit by the other members to recover their shares in outstandings left undivided at a partition of a joint Hindu family, and subsequently realised by one member of the separated family is governed by Art. 62 (c). **Tara-chand v. Pranchand**, 4 N.L.R. 84.

H. V. DRAKE-BROCKMAN, J.C.

References:—(a) 26 M. 544 (559), R. (b) 32 C. 527 (533), R. and (c) 6 A. 442; 24 C. 309, F.

(60-a) Art. 62—See No. 50, *supra*.

(61) *Arts. 62, 95 and 97—Suit for damages for fraud—Burden of proof*.

In a suit for damages based on fraud, when it is doubtful at what precise time the fraud became known, to the plaintiffs, the onus is on the defendant to show that the suit is out of time (a)

A suit to recover damages for fraud is governed by Art. 95, and not by Art. 62 or 97, of the Limitation Act (b).

Where a person fraudulently assigned a debt, not really existing, to the assignee, held that the assignee was not bound to assume the truth of the debtor's case—that the debt was not really existing—as set forth in his written statement; and, that time, for a suit by the assignee for damages against the assignor, began to run from the date of the Munsiff's judgment in the prior unsuccessful suit by the assignee against the debtor whose debt was pretended to be assigned. **Punnayil Kutt v. Raman Nair**. 13 M.L.J. 19=31 M. 230=4 M.L.T. 80.

WALLIS AND SANKARAN NAIR, JJ.

References —(a) 17 B. 341, R. (b) 27 M. 343, R.

(61-a) Art. 68—See No. 40, *supra*.

(62) *Sch. II, Art. 75—Instalment bond—Creditor having an option of suing for the whole on first default—not exercising that option—Limitation*.

Under the terms of an instalment bond, the creditor had an option to recover the whole amount, but did not avail himself of it. On the contrary, he brought this suit for recovery of an instalment, more than three years after the date of the first default, held, that the suit was not barred by limitation. When a bond is not so worded as to compel a creditor to sue for the whole amount at once on the first default, he could not be compelled to sue for the

Limitation Act—(Continued).

whole (a). **Ajudhia v. Kunjal**, 5 A.L.J. 72=A.W.N. (1908), 36=30 A. 123.

KNOX AND AIKMAN, JJ.

References —(a) 16 A. 371, applied; (1907) A.W.N. 139, R. 31 C. 297; 21 C. 542; dissented from in L.P.A. 81 of 1893.

(63) *Arts. 83, 113 and 116—Suit upon covenant in registered deed of exchange of lands—Special contract to indemnify on deprivation—Not a suit for specific performance—Cause of action*.

A registered exchange deed effecting an exchange of lands stated; "There is no dispute in respect of the said lands. If disputes should so arise, the respective party shall be answerable to the extent of his private property." The plaintiff was subsequently deprived of some of the land acquired by exchange and brought a suit upon the above covenant more than three, but less than six, years after the date of deprivation.

Held that, since it was settled that suits for failure to pay money according to contract were to be regarded as suits for compensation for breach of contract and not as suits for specific performance, Art. 113, Limitation Act, should not be applied to the case; that, though, in the absence of a special contract, the provisions above cited may amount to a covenant for title and the breach may be considered to have occurred as and from the date of the deed (which, in this case, was more than six years before the institution of the suit), yet as there was a special contract to indemnify the party as and when the deprivation took place, the plaintiff had, under Art. 116 read with Art. 83 of the Act, six years from the date when he was actually damaged, and that the suit was within time. **Srinivasa Raghava Dikshidar v. Ranga-sawmi Iyengar**, 18 M.L.J. 477.

WHITE, C.J., AND WALLIS, J.

(63-a) Art. 84.—See No. 20, *supra*.

(64) *Art. 85—Defendant signing plaintiff's accounts—Defendant acting as though the signature referred to the whole amount—Effect*.

The defendant in this case signed the plaintiff's accounts and subsequently acted as though the signature referred to the whole amount.

Held, that the Judge was justified in treating the signature of the defendant as applying to

Limitation Act—(Continued).

the whole amount due under the plaintiff's accounts.

Held, also, that Art. 85 of the second schedule was rightly applied to the case and the signature of the defendant was a sufficient acknowledgment to save limitation. **Pubjuntia Ramachandrayya v. Lintamitti Narayana Chetty**, 4 M.L.T. 77.

WALLIS, J.

(65) *Sch. II, Arts. 89, 116 and 132*—Suit for account by principal against agent—Contract of service in writing and registered—Limitation. See **ACCOUNTS**, No. 1, 7 C L.J. 279

(66) *Sch. II, Art. 91*—Limitation—Suit for cancellation of a deed—Suit for a declaration that the transaction evidenced by the deed was fictitious.

A suit for a declaration that a transaction embodied in a particular deed was from its very inception a sham transaction is to be distinguished from a suit for cancellation of the deed. The former kind of suit does not fall within the purview of Art. 91 of the second schedule to the Indian Limitation Act **Jagardoo Singh v. Phuljhari**, A.W.N. (1908), 156 = 5 A.L.J. 421 = 30 A. 375.

STANLEY, C.J., AND BANERJI, J.

References:—23 C. 460 & 12 C.W.N. 562, R.
(66-a) Art. 91—See No. 46, *supra*.

(67) *Arts. 91 and 144*—Estoppel—Immoveable property left by a Mahomedan—Mere delay or silence in suing not estoppel—Alienation by one co-owner beyond his share—No necessity to get the transfer set aside—Co-owner competent to recover his share within twelve years.

Held, that, where a Mahomedan possessed of immoveable property dies, leaving several heirs to succeed him, and one of them alienates the whole or a portion of it exceeding his interest therein, every one of the heirs is entitled to recover his share within twelve years from the death of the deceased under Art. 144 of the second schedule to the Indian Limitation Act XV of 1877, and is not obliged to sue for setting aside the alienation within the period prescribed in Art. 91 of the Schedule (a).

Held, also, that mere silence or delay in suing without any overt act of omission calculated to mislead the alienee creates no estoppel, and, in the absence of clear and tangible ground, the period of limitation cannot be shortened.

Limitation Act—(Continued).

Practice:—Further appeal being not competent, it was treated as a petition for revision under S. 70 (b) of the Punjab Courts Act, 1884. **Amir Shah and Fateh Ali v. Haidar Shah**, 5 P.W.R. 1908.

CHATTERJI AND KENSINGTON, JJ.

References —(a) 55 P.R. 1897; 56 P.R. 1908 (F.B.) F., 80 C. 990, D.

(67-a) Art. 95—See No. 61, *supra*

(67-b) Art. 97—See No. 61, *supra*.

(68) *Arts. 97 and 116*—Breach of covenant—Dispossession of the vendee—Return of sale consideration—Registered sale deed.

A sale deed set out that the property sold was unincumbered and there was a covenant that if the vendee was dispossessed from any portion of the property, the vendor would repay a proportionate part of the sale price. The vendee was dispossessed from a portion of the property by a prior incumbrancer. *Held*, that Art. 116 and not 97, Sch. II, of the Limitation Act governed the suit, and the suit could be brought within six years from the date of dispossession. **Ram Jaggi Rai v. Kauleshar Rai**, A.W.N. (1908), 185 (note) = 5 A.L.J. 484 = 30 A. 405.

AIKMAN AND KARAHAT HUBAIN, JJ.

References.—5 A.L.J. 410, F.; 26 B. 750, R.

(68-a) *Sch. II, Art. 104*—Suit to recover deferred dower when talak pronounced in wife's absence. See **MAHOMEDAN LAW (DIVORCE)**, No. 3, 13 C.W.N. 134.

(69) Art. 105, scope of—Construction of article conflicting with S. 43, C.P.C., not to be made. See **MORTGAGE (REDEMPTION)**, No. 9, 5 A.L.J. 192.

(70) *Art. 106*—Suit for settlement of partnership accounts—Realization of partnership assets subsequent to dissolution—Limitation.

A suit for the settlement of partnership accounts, in which the plaintiff prays for the partnership accounts to be taken and that the plaintiff should be awarded whatever is found due to him, with interest, is governed by Art. 106 of the Limitation Act. And, if such a suit is filed more than three years after the date of the dissolution of the partnership, the suit must be held to be barred.

If, subsequent to the dissolution, the plaintiff has realized money by the sale of some part-

Limitation Act—(Continued).

nership property, and the same is entered in the partnership books, such entry will give him no fresh cause of action, and will not in any way affect the period of limitation prescribed by Art. 106 of the Act. **Verhomal Sabalmal v. Gobindram Ramdas**, 1 Sind. L.R. 169.

PRATT AND CROUCH, JJ.

(71) Art. 106—First suit by partner for declaration of his right to, and for partition of, partnership property standing only in one partner's name—First suit withdrawn—Second suit for partition of partnership property standing in the joint name of partners, but not included in first suit—Second suit barred by Art. 106 being only a suit for share in partnership dissolved more than three years ago. See CIV. PRO. CODE, No. 65, 5 A.L.J. 278.

(72) Art. 106—Suit to recover share of profits—Suit good as suit for contribution See **PARTNERSHIP**, No. 10, 4 M.L.T. 475.

(73) Arts. 109 and 120, applicability of—Suit for mesne profits—"When the profits are received," meaning of. See **MESNE PROFITS**, No. 6, 8 C.L.J. 181.

(74) Arts. 110 and 116—Suit for recovery of royalty upon registered document—Article governing suit 116, and not 110. See **TRANSFER OF PROPERTY ACT**, No. 75, 12 C.W.N. 724.

(75) *Sch. II, Arts. 111 and 132—Limitation—Act No. IV of 1882 (Transfer of Property Act)*, S. 55 (4) (b)—Suit by vendor to enforce charge for unpaid balance of purchase money.

Held, that a suit for the enforcement of the payment of purchase money by sale of the purchased property is a suit to enforce a statutory charge, differing from the lien which an unpaid vendor in equity possessed for the recovery of the balance of his purchase money, and that the article of the Limitation Act applicable is Art. 132, and not Art. 111 (a).

One of the duties of a vendor, as prescribed by S. 55 of the Transfer of Property Act, is to discharge, amongst other things, all incumbrances on the property existing at the date of the sale, except where the property is sold subject to incumbrances. **Munir-un-nissa v. Akbar Khan**, A.W.N. (1908), 71=3 M.L.T. 374=5 A.L.J. 243=30 A. 172.

STANLEY, C.J., BURKITT AND AIKMAN, JJ.

References:—(a) 81 C. 57; 21 A. 454 and 29 M. 305, *F*; A.W.N. (1891), 130, *overruled*.

Limitation Act—(Continued)

(76) Art. 112—Company—Winding up—Call before winding up—Recovery of unpaid portions of calls barred—Whether new liability created by S. 61 of Act VI of 1882 is affected. See **ACT VI OF 1882 (COMPANIES)**, No. 1, 3 M.L.T. 250.

(76-a) Art. 113—See No. 63, *supra*.

(77) *Sch. II, Arts. 113, 116 and 144—Suit for possession on title of orthamulyani lease.*

In a suit for possession based on the title of an *orthamulyani* lease, the article applicable is, neither Art. 113 nor 116, but Art. 141 of the Limitation Act, 1877 (a). **Mogera Nandi v. Parameshwar Udpa**, 3 M.L.T. 241=31 M. 51.

BENSON AND MILLER, JJ.

Reference —(a) 11 B.L.R. 312 (322) (P.C.), *R*.

(78) Arts. 113 and 114—Lessor and lessee—Contract of lease—Suit for specific performance—Suit for possession of immovable property—Limitation See **LEASE**, No. 3 5 A.L.J. 529.

(78-a) Art. 115—See No. 40, *supra*.

(79) Art. 116—Adoption inherently invalid need not be impugned independently of claim brought for possession of adopter's estate after his death. See **MAHOMEDAN LAW (INHERITANCE)**, No. 1, 56 P.W.R. 1908.

(80) 116—Application for personal decree against the mortgagor—Limitation. See **TRANSFER OF PROPERTY ACT**, No. 59, A.W.N. (1908), 161.

(81) *Sch. II, Art. 116—Breach of covenant by lessee—Suit for damages—Registered pottah but no habuliyat—Limitation—Failure to pay rent due by lessor to superior landlord—Sale of lessor's interest by superior landlord—Measure of damages—Contract Act (IX of 1872), S. 73 (a)—Contributory negligence*

A suit to recover damages for breach of covenants contained in a lease, the terms of which were embodied in a registered pottah executed by the lessor only is governed by Art. 116 of Sch. II of the Limitation Act (a).

Where the lessee agreed with his lessor to pay the rent due by the latter to the superior landlord but failed, and the superior landlord then recovered a decree for rent against the lessor and sold his interest in the leasehold property in execution of the decree

Held—That the sale was not the natural consequence of the lessee's default, as the lessor ought to have paid the rent due to the superior

Limitation Act—(Continued).

landlord when he came to know of the lessee's default, and the lessee should not be made liable for the value of the property sold **Girish Chandra Das Mazumdar v. Kunjo Behari Malo**, 12 C.W.N. 628=85 C. 689.

MACLEAN, C.J., AND DOSS, J.

References—(a) 19 M. 52, 25 M. 50, 25 M. 587, *relied on*; 8 Bom. L.R. 667, *dis*.

(82) *Sch. II, Art. 116—Limitation—Suit for compensation for the breach of a contract in writing registered*

A registered mortgage bond provided that the amount secured by it should be paid by instalments and that in case of default the mortgagee would be entitled to take possession. Further, that, should there be any loss in the recovery of the amount due or in delivery of possession of the mortgaged land, the mortgagee would have power to realize the amount secured by the bond with interest at 1 per cent. from the date of the cause of action till repayment, either from the person or from the property, moveable or immovable, of the debtor, or from the property mortgaged.

Held that a suit based upon the foregoing covenant to recover the mortgage money upon failure of the mortgagor to pay instalments was in substance a suit for compensation for breach of contract, to which the limitation prescribed by Art. 116 of the second schedule to the Indian Limitation Act, 1877, applied. **Collector of Mirzapur v. Dewan Singh**, A.W.N. (1908), 160=5 A.L.J. 486=80 A. 400.

STANLEY, C.J. AND BANERJI, J.

Reference—8 A. 600, R.

(83) *Sch. II, Art. 116—Limitation—Suit for compensation for the breach of a contract in writing registered.*

A deed of sale of immovable property, duly registered, contained a covenant to the effect that in the event of a claim being advanced by a co-sharer, or in the event of the purchaser losing any part of the property in any other way, he would be entitled to a refund of the consideration and to damages. The purchaser, failing to get possession of part of the property purchased, sued for possession or in the alternative for a refund of a proportionate part of the consideration money and damages. *Held*, that as regards the latter relief the suit was governed by Art. 116, and not by Art. 97, of the second schedule to the Indian Limitation Act, 1877.

Limitation Act—(Continued).

Mul Kunwar v. Chattar Singh, A.W.N. (1908), 185=5 A.L.J. 480=80 A. 402.

STANLEY, C.J. AND BANERJI, J.

(83-a) Art. 116—See Nos. 63, 65, 68, 74 and 77, *supra*.

(84) *Art. 118—Suit against adoptee by reversioner of adopter for possession of adopter's property in adopter's possession.*

Where property is in the possession of a person as the adoptee of the last male owner, a suit by a reversioner of such last male owner, for possession of the property, is governed by Art. 118 and time runs from the date, when the alleged adoption became known to the reversioner (plaintiff). **Ishar v. Partap Singh**, 38 P.R. 1907=13 P.L.R. 1908.

CLARK, C.J.

References—56 P.R. 1903 (F.B.), 25 B. 337 (P.C.); 13 C. 908 (P.C.), R.

(85) *Sch. II, Art. 118—Adoption—Suit for possession—No acquisition of title by apparent adoption not set aside within six years—Declaratory suit to set aside adoption not necessary*

S and others, the reversioners of one F who died in 1891 sued for possession of certain land left by F, and held by K, who claimed it as the adopted son of F.

The suit was instituted on 4th November, 1905. Following the previous Punjab Rulings, the Divisional Judge dismissed the claim as barred by limitation.

Held, that Art. 118 of second schedule to Indian Limitation Act (XV of 1877), does not apply to a suit for recovering possession of property in the hands of a defendant holding it under an alleged adoption even if not set aside within the period prescribed by the said article; and that it (article) applies only to a declaratory suit if brought to challenge an adoption only (a). **Surjan Singh v. Kharak Singh**, 79 P.W.R. 1908=96 P.R. 1908.

CLARK, C.J., AND REID, J.

References:—28 A. 727 (P.C.), F.; 28 A. 727 (P.C.) practically overruling P.R.C. Nos. 71 of 1901–20 of 1902 and 98 of 1907; 30 M. 808 and 17 M.L.J. 282, F., 27 C. 242 and 24 A. 195, *appr.*; P.R.C. No. 56 of 1908, R.; 24 B. 260–25 B. 337 and 26 B. 291, *dis*.

(86) *Sch. II, Art. 119—Adoption—Denial of factum and validity of adoption—Limitation.*

Limitation Act—(Continued).

Art. 119 of Sch. II of the Limitation Act, 1877, applies to all suits in which either the *factum* or the validity of an adoption is denied.

The observations to the contrary in *Ningawa v. Ramoppa* (a) and *Shivaram v. Krishnabi* (b) held to be *obiter dicta*. **Laxmawa Basappa v. Ramappa Yellappa**, 9 Bom. L.R. 1054 = 92 B. 7

CHANDAVANKAR AND HEATON, JJ.

References:—(a) 5 Bom. L.R. 308, *diss*
(b) 8 Bom. L.R. 89, *diss*.

(87) *Art 120—Denial of right to share shamilat in a revenue partition proceeding—Revenue officer's order to establish the right by a civil suit—When cause of action arises in such a case.*

K and others applied to the Revenue authorities for partition of the Shamilat land, their application was opposed on the ground that they had no right to a share in the said land, and K and others were referred to a civil suit to establish their right which they eventually brought on 16th January, 1906.

Held, that the claim of K and others was barred by time inasmuch as their cause of action arose on the date their right was denied, and that, under Art. 120 of the Act which is applicable to a suit of this description, they had to bring it within six years from the date of denial of their right. **Ahmad v. Karmdad**, 11 P.W.R. 1908.

RATTIGAN AND LAL CHAND, JJ.

(88) *Art. 120—Suit for declaration of title by person in possession—Limitation*

A suit for possession by a person in possession does not lie. He can only sue for a declaration of his right to the possession of the land. The period of limitation for such a suit is, under Art. 120, six years from the date on which the vendor denies the title. Certain land was mortgaged with possession and the mortgagor, subsequently executed in favour of the mortgagee a deed of sale of the land. In 1898 mutation was effected in favour of the mortgagee as owner. In February, 1899, this mutation was set aside on the mortgagor's appeal. The suit for declaration was instituted by the mortgagee's heirs in April, 1905. *Held*, that the suit was barred under Art. 120, Limitation Act. **Munshi Ram v. Hammi** 61 P.R. 1908 = 108 P.W.R. 1908.

REID, J.

References:—20 A. 35 (F.B.); 88 P.R. 1882, R.; A.W.N. (1905), 96, D.

Limitation Act—(Continued).

(89) *Art. 120—Suit for pre-emption based on foreclosure—Time to be reckoned from date when the decree is made absolute—Limitation.* See PRE-EMPTION, No. 15, 10 O.C. 374.

(90) *Art. 120—Suit by reversioners for declaration of the invalidity of an alienation made by a widow—Suit by five plaintiffs, one of whom had attained majority within three years prior to suit—Suit held barred.* See HINDU LAW (REVERSIONERS), No. 3, 3 M.L.T. 319

(91) *Sch. II, Art. 120—Declaration—Cause of action—Denial of title*

Where the defendant's name was entered in the revenue papers in 1895, and the plaintiffs in 1903 applied for correction of those papers, when the defendant again asserted his title, *held*, the plaintiffs' cause of action for a declaratory suit arose in 1895, and there was no fresh cause of action in 1903, and the refusal to have the entry corrected was a continuation of the original cause of action.

Where the plaintiff is in possession and asks for a declaratory decree, the limitation applicable to the suit is that prescribed by Art. 120, Sch. II, Limitation Act, and should be computed from the date on which his cause of action arose (a). **Akbar Khan v. Turaban**, 5 A.L.J. 637 = A.W.N. (1908), 252 = 4 M.L.T. 444.

STANLEY, C.J., AND BANERJI, J.

References:—(a) 20 A. 35 (F.B.) *h.*, 18 A.W.N. 215 and S.A. No. 263 of 1907 (*unreported*), Allahabad H.C., D.

(92) *Sch. II, Art. 120—Limitation for suits against rival pre-emptors.* See PRE-EMPTION, No. 20, 20 P.R. 1908.

(92-a) *Art. 120—See Nos. 14, 46, 50, 51, 59 and 73, supra*

(93) *Suit by expelled partner for account or for dissolution of partnership and for share of profits—Suit within time if brought within six years of date of expulsion—Art. 120, not Art. 105, applies.* See PARTNERSHIP, No. 2, 12 C.W.N. 455

(94) *Arts. 120 and 123—Immoveable property converted into money—Money losing all impress of its origin and becoming moveable property in widow's hands—Art. 120 applies—Reversioners suing to recover property held for some intervening time by widow—Art. 123 not applicable to such case.* See HINDU LAW (REVERSIONERS), No. 2, 10 Bom. L.R. 210

Limitation Act—(Continued).

(95) Arts. 120, 127, 144—Suit to enforce a claim for joint or common occupation by one co-owner of joint or common land, against another taking exclusive enjoyment, without prejudice to joint or common title. See *CO-OWNERS*, No. 2, 4 N.L.R. 120.

(96) Sch. II Art. 121—Suit by assignee of purchaser of estate sold under Revenue Sale Law to avoid encumbrances governed by this article of the Limitation Act. See *ACT XI OF 1859 (REVENUE SALE LAW)*, No. 5, 12 C.W.N. 1029.

(96-a) Art. 121—See No. 48, *supra*.

(96-b) Art. 123—See No. 91, *supra*.

(97) Art. 121—Claim to hereditary office—Adverse possession.

According to Art. 121, the plaintiff's right to recover an hereditary office would not be barred unless the defendant is found to have been in possession of it adversely to the plaintiff for twelve years, and the fact that the plaintiff did not have possession of the office at any time within twelve years previous to the suit would not be sufficient in itself to bar his claim. **Regunatha Chariar v Thiruvengada Ramana Chariar**, 1 M.L.T. 466.

MUNRO AND ABDUR RAHIM, JJ.

Reference—9 B.H.C.R. 260, J.

(98) Art. 125—Limitation—Alienation—Futuristic award—Hindu widow.

A Hindu widow, plaintiff in a suit to recover property, in respect of which she was entitled to a Hindu widow's estate from the possession of the widows of the other members of her husband's family, entered upon a collusive arbitration by which the whole of the property of the plaintiff's husband was divided amongst certain female members of the family, it being declared that each of the parties to the arbitration proceedings took an absolute estate in the share allotted to her. *Held*, that this proceeding amounted to an "alienation" of the property so dealt with within the meaning of Art. 125 of the second schedule to the Indian Limitation Act. **Ram Sarup v. Ram Del**, A.W.N. (1907) 33-4 A.L.J. 160=29 A. 239=3 M.L.T. 59.

STANLEY, C.J., AND BURWIT, J.

(99) Art. 125—Alienation by Hindu widow—Suit by reversioner during her life-time to

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declare it void beyond her life. See *HINDU LAW (ALIENATION)*, No. 9, 12 C.W.N. 857.

(99-a) Art. 127—See No. 95, *supra*.

(100) Art. 132—Claim for balance of money due to contractor—Contract providing for a lien on the building for money due under the contract—Limitation. See *ACT VI OF 1882 (COMPANIES)*, No. 4, 95 P.R. 1908.

(101) Sch. II Act. 132 governs suit for recovery of arrears of *Malikana* allowance. See *ACT II OF 1901 (AGRA TENANCY)*, No. 11, A.W.N. (1908), 209.

(101-a) Art. 132—See Nos. 65 and 75, *supra*.

(102) Arts. 132, 135 and 144—Limitation—Suit for possession of property mortgaged by way of conditional sale—Starting point for Limitation.

Held that a suit for possession of property, mortgaged by way of conditional sale, after foreclosure proceedings, must be filed within twelve years of the date of foreclosure, and that foreclosure proceedings taken more than twelve years after the date for re-payment of the mortgage consideration do not afford a starting point for limitation, a suit based on foreclosure proceedings taken more than twelve years after the date for re-payment is barred by limitation. **Mangal Singh v. Sher Singh**, 68 P.W.R. 1908.

RID, J.

References—90 P.R. 1895 and 35 P.R. 1899, F., 65 P.R. 1906 and C.A. No. 915 of 1906, decided on 27th May, 1907, R.

(103) Art. 134, application of. See *MORTGAGE (REDEMPTION)*, No. 19, 4 M.L.T. 73.

(103-a) Art. 134—See No. 15, *supra*.

(104) Arts. 134 and 144—Joinder of causes of action—Alienation of property belonging to a Religious Institution—Suit to contest it and for recovery of mesne profits—Civil Procedure Code (XIV of 1882), S. 44.

N, a Mahant of a Religious Institution sued B for recovering possession of some property belonging to a Religious Institution which had been mortgaged by his predecessor more than twelve years before institution of the suit together with Rs. 400 on account of its rent which B had realised, on the allegation that the mortgagor had no power to alienate the said property.

Held, that, the suit was not bad for misjoinder of causes of action, as the reliefs sought

Limitation Act—(Continued).

for were really (1) possession of the property and (2) mesne profits realised therefrom.

Held, also, that the suit is not barred by limitation, inasmuch as, when a Mahant of a Religious Institution mortgages any property belonging to the Institution, his successor can sue to impugn the validity of the mortgage within twelve years, under Art. 144 of the second schedule to the Indian Limitation Act, XV of 1877, from the date of his being appointed Mahant of the Institution, and that a mortgage effected by the trustee for the time being of a "property conveyed or bequeathed in trust" does not constitute the mortgagee a "purchaser" within the meaning, and for the purposes of Art. 134 of the Limitation Act, as the word "purchased" does not include anything short of an absolute alienation of title to the property and is not used in its English technical sense (a).

Held, further, that Art. 134 of the Limitation Act is not applicable. The plaintiff does not derive his right to sue from or through the last Mahant but is appointed, according to the findings of the Division Bench, by the community itself and consequently he is not an heir of the last Mahant (b). **Bashesar Lal v. Bhai Natha Singh**, 35 P.W.R. 1908 (F.B.) = 102 P.L.R. 1908 = 30 P.R. 1908.

REID, RATTIGAN AND LAL CHAND, JJ.

References —(a) 23 C. 537; 32 C. 511, 20 A. 482, 24 M. 471; and 2 C.L.J. 546, *dissented from*. Civil No. 124 P.R. 1883, 12 M. 316, and remarks of Aikman, J., in 20 A. 482 and of Davies, J. in 24 M. 471, *approved*; (b) 23 M. 271 (P.C.), *distinguished*.

(105) Sch. II, Art. 135—Mortgage of revenue paying land with possession—Mortgagee to receive *malikana* by way of interest and a certain rate within a fixed time, or to get actual possession in case of default—Limitation to run from the date of default. See JURISDICTION (OF CIVIL AND REVENUE COURTS), No. 9, 17 P.W.R. 1908.

(106) Art. 135, Sch. II—Mortgage—Default of payment of mortgage-money—Suit by mortgagee for possession of land mortgaged or for money due under mortgage.

Where a suit was brought by the plaintiffs' appellants, as mortgagees for possession of the land mortgaged on default of payment of mortgage-money or for money due under the mortgage, *held*, that under the terms of the mortgage-

Limitation Act—(Continued).

deed a suit for money due did not lie, that the appellants' only remedy was a suit for possession as mortgagees, and that the suit for possession was barred by Art. 135, Sch. II, Act XV of 1877, the mortgagors' right to possession having been determined more than twelve years before suit on failure to pay six instalments of the mortgage-money payable in thirty-one six-monthly instalments. **Bishan Lal v. Khushali**, 21 P.R. 1908 = 156 P.W.R. 1908.

REID, J.

References .—(a) 10 C. 68 and 96 P.R. 1890, *referred*.

(106-a) Art. 135—See Nos. 102 and 114, *supra*.

(107) Art. 136—Mortgage—Possession of immoveable property given in execution of money-decree by one co-sharer to decree-holder until payment of decretal amount—Sale of his own interest by another co-sharer to stranger—Suit by vendee to eject decree-holder—Limitation. See LIMITATION, No. 6, 69 P.W.R. 1908.

(108) Sch. II, Art. 138, scope of—Suit by assignee from auction-purchaser of permanent tenure to recover from landlord, governed by Art. 142. See ACT I OF 1879 (CHOTANAGPUR LANDLORD AND TENANT PROCEDURE), No. 1, 12 C.W.N. 617.

(109) Art. 139, when time begins to run under—Scope of—Tenants, who are, within meaning of—Art. 144—Suit against representatives of tenant by sufferance

In a suit by a landlord to recover possession from a tenant for a term of years, time begins to run, under Art. 139 of the Limitation Act, from the expiry of the term which must be held to be the time when the tenancy is determined within the meaning of the Art. (a). Art. 139 deals with suits to recover possession from a tenant, that is to say, a person who was tenant until his tenancy determined.

The representatives of a tenant by sufferance who enter after his death cannot be said to have ever been tenants within the meaning of Art. 139, and a suit against them would fall within Art. 144. **Yadappalle Narasimham v. Dronamraju Setharamamurthy**, 18 M.L.J. 26 = 3 M.L.T. 256 = 31 M. 163.

WHITE, C.J., AND WALLIS, J.

References :—(a) 22 B. 893; 24 B. 504; 2 Sm. L.C.P. 10th Ed., p. 559, R; 8 M. 424 (427), *overruled*.

Limitation Act—(Continued).

(110) Art. 139, time begins to run under, against lessor from date of expiry of lease, where lessee holds over and no arrangement between him and lessor is arrived at creating a new tenancy. See EVIDENCE ACT, No. 15, 7 C.L.J. 615.

(111) Art. 141—Act I of 1900 (Punjab), Art. 1—Mortgage without possession by way of conditional sale of ancestral property by a childless proprietor—His widow selling that property along with other and parting with its possession—Suit by reversioner to recover—Limitation. See LIMITATION, No. 4, 70 P.W.R. 1908.

(112) Arts. 141 and 144—Adverse possession—Claim for possession of property of a Hindu, leaving widow and other heirs—Abandonment by widow—Starting point of limitation.

Held, that when a widow (bound either by Hindu or customary law) on her husband's death does not assert her rights in her husband's property and expressly abandons them, and its possession is immediately taken by one of the reversioners of her husband who begins to hold it adversely both to her and other heirs of her husband, the starting period of limitation for other heirs to succeed to that property is not the date of her death, but the date of her husband's death, and Art. 144 applies and not Art. 141 of the Limitation Act XV of 1877. **Sahib Ditta v. Raju**, 61 P.W.R. 1908.

JOHNSTONE AND HURRY, JJ.

References.—9 P.R. 1899, *appx.* and *F*; 29 B. 725 and 49 P.R. 1901, *D.*, 23 A. 448, *diss.*

(112-a) Art. 142—See No. 36, *supra*.

(112-b) Art. 144—See Nos 15, 36, 46, 54, 55, 67, 77, 78, 95, 102, 104, 109 and 112, *supra*.

(112-c) See LIMITATION, No. 2, 63 P.W.R. 1908.

(112-d) Art. 144—Gift under an invalid instrument—Attornment by donor's tenant to donee—Donee's possession when adverse. See TRANSFER OF PROPERTY ACT, No. 81, 4 M.L.T. 327.

(113) Art. 144, not Art. 91, of Limitation Act, 1877, applicable where real owner is entitled to recover property from benamidar to whom it was transferred with fraudulent object of defeating creditors, not carried out. See BENAMI TRANSACTIONS, No. 4, 12 C.W.N. 562.

(114) Sch. II, Arts. 147, 135 and 178—Mortgage in possession—Application for foreclosure

Limitation Act—(Continued).

of mortgage—Limitation. See MORTGAGE (FORECLOSURE), No. 5, 57 P.R. 1908.

(115) Art. 148—Right to redeem mortgage when accrues.

Where a mortgage executed in 1828 was made redeemable at the close of any native year from that date, a suit for redemption brought in 1902 was held to be barred. **Yishvendra Thirtha-swami v. Vishnumurti Bhatta**, 18 M.L.J. 235.

WHITE, C.J., AND SANKARAN NAIR, J.

References.—5 B. 22; 12 C. 69; 16 M.L.J. 146, 23 M. 33, *R.*

(116) Art. 169—Applicability of article where respondent had no notice of appeal—Notice of appeal not served on respondent—Declaration under S. 82, C.P.C., not made—Sufficient service.

Where a respondent had no notice of an appeal, Art. 169, Sch. II of the Limitation Act, can have no application.

Where a Court did not, before proceeding with an appeal, declare under S. 82, C.P.C., that the notice of the appeal had been duly served, *held* that, without such declaration, there was no sufficient service. **Yenkobachar v. Raghavandrachar**, 18 M.L.J. 96.

BENSON AND MUNRO, JJ.

(117) Arts. 175 C. and 178—Limitation—Application for bringing on record the representative of a deceased respondent in second appeal.

The period of limitation for bringing in the representative of a deceased respondent in a second appeal is the one prescribed by Art. 175-C and not by Art. 178 of the Limitation Act, 1877. **Sheikh Adam v. Balaji Krishnaji**, 10 Bom. L.R. 509.

CHANDAVARKAR AND KNIGHT, JJ.

References.—29 M. 529, *diss.*, 34 C. 1020, *F*.

(118) Art. 178—Rule 859 of the High Court Rules—No period of limitation applies to proceedings under this rule—Practice—Recovery of solicitor's costs.

There is no specific provision in the Limitation Act, or anywhere else, fixing a period of time within which an application for enforcement of payment of costs by a solicitor against his client, by the summary method provided by Rule 859 of the High Court Rules should be made. Art. 178 of the Limitation Act applies only to applications under the Civil Procedure

Limitation Act—(Continued).

Code, 1882. Solicitors can recover costs due to them by a client in different suits by one summons. It is not necessary to take out a separate summons for costs due in each suit. **Wadia, Gandhi and Co v. Purohotum Shivji**, 9 Bom. L.R. 508=32 B. 1.

DAVAR, J.

(119) Art. 178—Rejection of appeal under S. 549, C.P.C.—Application to have it restored on furnishing the required security—Limitation See Civ. Pro. Code, No. 299, U.B.R. (1908), 1st Quarter, Limitation, p. 5.

(120)—Sch. II, Art. 178—Application under S. 318 of the C.P.C.—Limitation. See Civ. Pro. Code, No. 215, A.W.N. (1908), 162.

(120-a) Art. 178—See Nos. 114 and 117, *supra*.

(121) Arts. 178 and 179—*Execution proceedings pending—When right of decree-holder to apply for execution will be barred—Prior execution petition—Conditions under which it will be treated as pending*

So long as the proceedings initiated by the decree-holder are pending, his right to apply for their continuance occurs from day to day, i.e., on every day on which the Court does not *suomotu* continue them (a). The right to apply will not then be barred till three years have elapsed after the proceedings have ceased to be pending (b).

A Court has no legal authority to dismiss a petition for execution simply because execution has been stayed, but if that is so, the order of dismissal is not necessarily ineffective to dispose of the proceedings (c). But an order, made without notice and in the absence of both parties, cannot be regarded as an order between the parties at all. It amounts to no more than a direction to the officers of the Court to remove the proceedings from the pending list (d). The execution petition itself should, under the circumstances, be considered to have been pending.

Art. 178 ought not to be applied when the Court is asked to do something which it is bound to do (e), and that so long as proceedings are pending, limitation will not begin to run against an applicant.

On the 3rd October, 1899, an application was made to execute the decree in O.S. No. 260 of 1898, by attachment and sale of certain immoveable property mentioned in the application. An order was obtained on the 7th October, 1899. The judgment-debtor objected that the decree

Limitation Act—(Continued).

had been satisfied, but that objection was disallowed on the 31st October. The judgment-debtor appealed to the District Judge and obtained an order for stay of execution pending the hearing of the appeal. Upon this the District Munsiff, on the 15th December, 1899, passed the following order on the execution petition.—“Execution order to be stayed. Petition dismissed,” it did not appear that this order was passed after notice to the parties or in their presence.

The District Judge disposed of the appeal of the 20th July, 1900, remanding the matter for further inquiry, and, on the 25th January, 1901, the District Munsiff decided that the decree had been satisfied before the attachment. On the 11th December, 1901, the District Judge reversed this order, and on the 29th October, 1903, his decision was confirmed by the High Court.

Held, that under the circumstances, the petition of 3rd October, 1899, must be treated as pending, that the petition of the 7th July, 1905, was clearly barred so far as it was a fresh application for execution, i.e., so far as it asked for attachment of property not proceeded against in proceedings instituted by the application of 3rd October, 1899, and that, so far as it asked for sale of the property already attached under the petition of 3rd October, 1899, it was not barred. **Chalavadi Kotiah v. Paloori Alamelammal**, 18 M.L.J. 46=31 M. 71=3 M.L.T. 328.

MILLER AND MUNRO, JJ.

References—(a) 8 C. 420, F. (b) 27 A 334, R. (c) 21 M. 261, R. (d) 24 B. 345 (349), R. (e) 4 M. 172 and 6 B. 586, 7 C.L.R. 424, and 28 M. 551, R.

(122) Arts. 178 and 179—Sale of immoveable property under Revenue Recovery Act—Application by purchaser for delivery of possession. See ACT II OF 1864 (REVENUE RECOVERY, MADRAS), No. 2, 17 M.L.J. 441.

(123) Sch. II, Arts. 178 and 179—*Application by decree-holder, holding sale-certificate, for delivery of possession, under S. 318, C.P.C.*

An application by a decree-holder, who purchases in an execution-sale certain property and obtains a sale-certificate, for delivery of possession, under S. 318, C.P.C., of property purchased, is not in strictness an application for execution of the decree, a direction of delivery of possession being no part of the decree. So in

Limitation Act—(Continued).

the case of an application under S. 318, C.P.C., Art. 178 and not Art. 179 must be applied. **Sultan Sahib Markayar v. Chidambaram Chettiar**, 4 M.L.T. 356

MILLER AND SANKARAN NAIR, JJ.

References.—3 B. 438, 8 B. 257, 17 B. 228, F. 13 M. 304; *considered*.

(124) *Art. 179—Application for sale of other property, also dismissed—Third application to sell the property the sale of which was asked for in the first application—Whether could be treated as in continuation.*

A decree-holder obtained a decree for the sale of several properties against the representatives of I. He put the decree in execution on the 7th August, 1900, against the village B, which had come on partition, between the heirs of I, to S, and which was mentioned in the order absolute as liable to be sold. S objected on the ground that she had paid the proportionate share of the decretal amount. The application was dismissed. Thereupon, on the 30th January, 1902, the decree-holder applied for sale of another village in possession of the other set of heirs of I. They objected and their property was released on the ground that the village B ought to be sold first. The decree-holder applied for sale of B on 9th February, 1907. *Held*, that the execution of the decree was barred by limitation and the decree-holder could not get the benefit of intervening proceedings against the second set of I's heirs. The application could not be treated as an application in continuation of the application to sell the other village in possession of the second set of heirs as S had no interest in that. Further it could not be treated as an application made in continuation of the application of 1900 as that application had been dismissed (a). **Safia Begam v. Shiam Prasad**, 5 A.L.J. 622 = A.W.N. (1908), 253.

AIKMAN AND GRIFFIN, JJ.

Reference.—(a) 23 A. 13, R.

(125) *Art. 179—Appeal by some of the defendants—Date of appellate decree forms the basis from which limitation runs, even in case of those who have not appealed against the decree.* See Civ. Pro. Code, No. 153, 10 Bom. L.R. 939

(126) *Sch. II, Art. 179—Execution of decree—Limitation—Application in accordance with law—Notice issued to judgment-debtor in execution of an application not in accordance with law.*

Limitation Act—(Continued).

The plaintiff obtained a decree to the effect that according to the compromise between the parties, the defendant shall mortgage certain land of the plaintiff in lieu of a certain sum of money, within one month from the date of the decree. The mortgagee was not executed. Within three years of the decree, the decree-holder applied for execution by being placed in possession of the land specified, and, on the same date, notice issued to the judgment-debtor under S. 248 of the C.P.C., to show cause against execution issuing.

It was *held* that the decree-holder was not entitled to possession under the decree. The decree-holder withdrew his application, and, subsequently, applied under S. 260 of the C.P.C., for arrest of the judgment-debtor and attachment of her moveables after the expiry of more than three years from the date of decree.

Held, that the later application was barred by limitation and that it was not saved by the previous application, for it was not in accordance with law, and that the payment of any process-fee did not improve the position of the decree-holder. **Ganga Ram v. Mussammat Durgi**, 125 P.L.R. 1908 = 95 P.W.R. 1908.

REID, J.

(127) *Sch. II, Art. 179—Step in aid of execution—Leave to bid at sale—Prayer for amount bid to be set off against decree.*

An application by a decree-holder, in which he not merely asked for leave to bid at the sale, but further prayed that the amount which he bid might be set off against the decretal amount due to him, was a step in aid of execution (a), within the meaning of Art. 179 of Sch. II of the Limitation Act. **Nabadip Chandra Maiti v. Bepin Chandra Pal**, 12 C.W.N. 621.

RAMPINI AND SHARFUDDIN, JJ.

References.—(a) 12 A. 399 (F.B.), F.; 30 C. 761 (769), 10 C.W.N. 200; 13 A. 211; 21 B. 331, 22 A. 399, 9 C. 730; 23 C. 690, R. "

(128) *Sch. II, Art. 179—Execution of decree—Limitation—Appeal—Appeal not pressed—Terminus a quo.*

Where there has been an appeal from a decree limitation does not the less begin to run from the date of the final decree in appeal because the appeal may have been dismissed upon the representation of the appellants' counsel that he was unable to support it.

Limitation Act—(Continued).

Fazl-ur-Rahman v. Shah Muhammad Khan, A.W.N. (1908), 161=5 A.L.J. 580=30 A. 385.

AIKMAN AND GRIFFIN, JJ.

References—16 M.L.J. 393, *F.*, 1 A. 293, *D.*, 20 A. 124, *D.*

(128-a) *Sch. II, Art. 179—Application for execution of decree against a wrong person or dead person—Bona fide mistake—Step in aid of execution.*

Where an application for execution of a decree has been made, under the influence of a *bona fide* mistake, against a wrong person or a dead person, though that application could not be acted on, still it is an application in aid of execution within the meaning of Art. 179, cl. (4) of the Limitation Act (1877), so as to save the execution of the decree from being barred. **Bipin Behari Mitter v. Bibi Zohra**, 35 C. 1047.

BRETT AND COXE, JJ.

References—17 M. 76; 20 C. 388, *F.* and 19 A. 397, *disc.*

(128-b) Art 179—See Nos. 121, 122 and 123, *supra*

(129) *Art. 179 (2)—Appeal by some of the defendants against portion of decree—Appeal dismissed—Limitation for executing remaining portion of decree—S. 230 (a), Civ. Pro. Code.*

A partition suit was filed against nine defendants, on the allegation that two houses were joint and ancestral property of the parties. But the decree made a distinction among the defendants and granted relief to the plaintiffs in respect of the two houses, specifying the defendants from whom plaintiffs were to get their share of each house. Thus, there was only a single decree, though all the defendants were not interested in both the properties in respect of which the decree was passed. Some of the defendants appealed against the decree, in respect of house No. 1, which was, however, dismissed by the appellate Court. The plaintiff then applied for execution, in respect of the other house more than three years after the date of the original decree but within three years from the date of the appellate decree. One of the defendants, who was jointly interested in the second house, but had not joined in the above mentioned appeal, though he has been a party to all the proceedings, pleaded limitation, on the ground that the original decree

Limitation Act—(Continued).

still subsisted inasmuch as he has not appealed therefrom. *Held* that limitation runs, both under S. 230 (a), Civ. Pro. Code, and Art. 179 (2), Limitation Act, from the last order in appeal, and that Art. 179, cl. (2) applies to any such decree, against which an appeal was preferred by any of the parties to the original suit. **Anwar Ali v. Inayat Ali**, 52 P.R. 1907=8 P.L.R. 1908.

CHATTERJI, J.

References—22 P. 500; 25 C. 594, *F.*, 13 A. 1, *distd and disapp.*

(130) *Sch. II, Art. 179 (2)—Limitation—Execution of decree—Withdrawal of appeal.*

When an appeal is withdrawn, the appellant cannot claim to count the period of three years allowed for execution of the decree originally passed in his favour by the Lower Court from the date of his withdrawing the appeal. He has only three years from the date on which the original Court passed the decree (a). **Bhagwan Singh v. Mohan Lal**, 87 P.L.R. 1908=40 P.W.R. 1908=54 P.R. 1908.

JOHNSTONE, J.

References—(a) 30 M. 1 (F.B.), *It*; 22 B. 500 (506), 15 B. 370 (375); 1 M.L.J. 746; 15 M. 170 (173), 4 M. 43 (46), 1 A. 293 (295), *approved*.

(131) *Sch. II, Art. 179 (4)—Execution of decree—Limitation—Application to take some step in aid of execution—Payment of process fees.*

Held, that the mere payment of process fees on an application for execution, unaccompanied by any application asking the Court to take some specific action, will not have the effect of giving a fresh starting-point for limitation within the meaning of Art. 179 (4) of the second schedule to the Indian Limitation Act, 1877. **Sheo Prasad v. Indar Bahadur Singh**, A.W.N. (1908), 74=5 A.L.J. 258=30 A. 179

AIKMAN AND KARIMAT HUSAIN, JJ.

References—22 A. 358; 28 M. 399, *D.*

(132) *Art. 179, cl. (4)—Application for execution by legal representatives of deceased decree-holder not brought on record—Application in accordance with law—Construction of decree.*

A decree provided that the plaintiff was not entitled to execute the decree till the hypothecation of one of the defendants was discharged

Limitation Act—(Continued).

by the plaintiff. On the death of the decree-holder, his widow made an application before discharging the defendant's hypothecation for execution of the decree.

Her name was not placed on the record as the legal representative of the decree-holder, nor did she apply in her petition to be placed on the record. *Held*, that the application was one made according to law under Art. 179, cl (4) of the second schedule of the Limitation Act.

Held also, that the discharge of defendant's claim could not be treated as a condition precedent to the execution of the decree, but that the decree only made such discharge a condition precedent to the recovery of the money from the other defendants (a).

An application made by the widow of a decree-holder as his legal representative for the execution of the decree is an application in accordance with law, although she had not been placed on the record, nor had she applied to be so placed. **Alagiriswami Naidu v. Venkatachellapatti Iyer**, 17 M.L.J. 566—31 M. 77.

BENSON AND SANKARAN NAIR, JJ.

References —(a) 30 M. 28, R. (b) Ref. Cases 18 of 1880; 20 C. 755, 20 B. 76; 16 A. 26, R.

(138) *Art. 179, cl. 4—Execution application not in accordance with law—Prayer for notice—S. 248, C.P.C.—Saving of Limitation.*

An application for execution, though not in accordance with law, may be held to save limitation if it contains an application for the issue of a notice, under S. 248, C.P.C., in a case where a notice is a necessary preliminary in order to enable execution to proceed (a). **Kamakshi Pillai v. Ramaswami Pillai**, 18 M.L.J. 14.

MILLER AND MUNRO, JJ.

References —(a) 25 C. 594; 28 M. 557 and C.M.S.A. No. 87 of 1905 on the file of the Madras High Court, P.

(134) *Art. 179, cl. (4)—Application for recognition by transferee decree-holder—Step in aid of execution—C.P.C., S. 232—Application in accordance with law.*

Where a transferee decree-holder, instead of applying for execution, put in his application for recognition as transferee, and the Court, without returning the petition to him for amendment, acted in accordance with S. 232, C.P.C., made the order prayed for and the transferee

Limitation Act—(Concluded).

did not appeal against it; *held*, that the application must be taken to have been in accordance with law (a), and that a subsequent application for execution within three years from the date of the original application was not time barred. An application for recognition by a transferee decree-holder is an application to take a step in aid of execution in accordance with law (b). **Annamalai Mudaliar v. Ramalar**, 18 M.L.J. 24=4 M.L.T. 72=31 M. 234.

WALLIS AND SANKARAN NAIR, JJ.

References —(a) 14 M.L.J. 393, R. (b) 29 A. 301, R.

(135) *Art. 179, cl. (4)—Application for order absolute—not in accordance with Civil Rules of Practice—Step in aid of execution—Transfer of Property Act, S. 89.*

An application by the holder of a mortgage for an order absolute, under S. 89 of the Transfer of Property Act, although defective in the statement of particulars and unverified, and consequently returned as not being in accordance with the Civil Rules of Practice, may be an application for execution in accordance with the law and a step in aid of execution sufficient to save limitation, if the defects are not calculated to prejudice the judgment-debtor or mislead the Court. **Ramayyan v. Kadir Bacha Sahib**, 17 M.L.J. 596=3 M.L.T. 254=31 M. 68.

WALLIS AND MILLER, JJ.

References —16 M. 143; 6 M. 250; 17 M. 76, F; 26 M. 780; 28 M. 557, R.; 25 M. 244, *Expl.*

(136) *Art. 179, cl. (4)—Application by transferee of decree to bring in defendant's representative on record—Step in aid of execution. See Civ. Pro. Code, No. 129, 17 M.L.J. 485.*

(137) *Sch. II, Art. 179, cl. 5—Decree—Execution—Application for execution—Code of Civ. Pro. (Act XIV of 1882), S. 248—Notice—Date of the order.*

The date of issuing a notice under S. 248 of the Civ. Pro. Code is the date on which the Court orders the issue of notice and not the date on which the notice is actually issued. The limitation therefore under Art. 179, cl. 5 of the second schedule to the Limitation Act (XV of 1977) runs from the former date. **Juthal Kanjar v. Abdul Karim Khan**, 5 A.L.J. 524= A.W.N. (1908), 245=4 M.L.T. 446.

AIKMAN AND KARAMAT HUSAIN, JJ.

Limitation Regulation (Travancore).

- (1) *Instrument evidencing loan of paddy and providing for its return on certain date, whether bond—Limitation.*

The suit was on an instrument for certain quantity of paddy, which provided for the payment of the principal amount of paddy advanced on a certain date, and in default of such payment, for payment on demand with interest at certain rate. *Held*, in a suit on the instrument, that the instrument was not a bond falling within either Art. 57 or Art. 97, and that the suit fell under Art. 95 of the Limitation Regulation. **Narayanan Krishnan v. Kanakku Narayanan Krishnan**, 23 T.L.R. 48.

GOVINDA PILLAY AND MUTTUNAYAGOM PILLAY, JJ.

References.—10 T.L.R. 89; 7 B.H.C.R. 36, 21 T.L.R. 194, R.

- (2) Art. 132—Plaintiff suing for damages on the ground that the release deed executed by the defendant as part of the consideration for the sale-deed had become useless—Limitation. See **VENDOR AND VENDER**, No. 2, 23 T.L.R. 51.

Liquor.

Country liquor—Attachment and sale in execution—Collector's permission. See **Civ. Pro. CODE**, No. 176, 10 Bom. L.R. 13.

Lis pendens.

- (1) *Lis pendens—Transfer of Property Act (IV of 1882), S. 52—Mortgage suit—Interest, in immoveable property—Contentious suit.*

A suit on a mortgage is a suit with respect to an interest in immoveable property, and a suit for sale on a mortgage praying relief against the mortgagors and others is from the beginning a contentious suit within the meaning of S. 52 of the Transfer of Property Act. **Durga Prasad v. Madho Prasad**, 8 C.L.J. 153.

MITRA AND BELL, JJ.

Reference.—5 C.L.J. 568 = 29 A. 339 = 34 I.A. 102, R.

- (2) *Doctrine of lis pendens explained and its applicability, to the case of a claimant to pre-emption, whose right to pre-empt existed before the suit of the other claimants were filed, considered.* See **PRE-EMPTION**, No. 21, 26 P.R. 1908.

- (3) *Money decrees against estate of deceased debtor—Claim for mere money decree not an*

Lis pendens—(Concluded).

administration suit—Mortgage by heir—Rights of decree-holder and mortgagee. See **Civ. Pro. CODE**, No. 114, 52 P.L.R. 1908.

- (4) *In mortgage suit whether, continues after the decree nisi.* See **MORTGAGE (GENERAL)**, No. 8, 7 C.L.J. 1.

(5) *Suit for pre-emption—Sale of land during pendency of suit—Service of summons not effected—Plaintiff's right to decree not affected.* See **TRANSFER OF PROPERTY ACT**, No. 11, 5 A.L.J. 477.

- (6) *Law of, on what principle founded.* See **TRANSFER OF PROPERTY ACT**, No. 12, 4 M.L.T. 77.

(7) *Transfer pendente lite—Transferee could not be brought on record as legal representative in execution—Ss. 234, 372, Civ. Pro. Code.* See **Civ. Pro. CODE**, No. 132, 4 M.L.T. 190.

Local Boards Act

See **ACT V OF 1884 (MADRAS)**

Lord's Day Act

—entirely unsuited to the circumstances of this country—applicability of the Act to India—Proceedings taken on Sunday by Munsiff, whether void. See **PRACTICE**, No. 3, 5 A.L.J. 106.

Lunacy

- (1) *Lunatic, contracts by—Lunacy not known to the other contracting party—Contract Act (IX of 1872), Ss. 12, 30—Specific Relief Act (I of 1877), Ss. 38, 41—General presumption of insanity—rebuttal of—Expert opinion in questions of insanity—value of expert opinion—Burden of proof in cases of insanity—General rules of estimating evidence as to insanity.*

If a party to a contract seeks to enforce a contract which is void under S. 12 of the Contract Act on account of the absence of capacity to contract in the other contracting party, it is not permissible to give equitable relief. However, statutory relief can be given under Ss. 38 and 41 of the Specific Relief Act when rescission of a contract is asked for on this ground.

Where a person is not proved to be a lunatic on inquisition, it is necessary to rebut the general presumption of sanity. This can be done by proving that his mind was completely deranged so that he was incompetent to enter into any contract, or by proving that he was of unsound mind with regard to the particular transaction.

Lunacy—(Concluded).

The opinion of an expert on facts proved or admitted is only relevant when the Court has to form an opinion on a point of science or art. Expert opinion even on admitted or proved facts will differ, and then the Court has to decide which opinion it will rely on. But when the facts are not admitted, the Court has first to come to a conclusion on the evidence as to what facts have been proved, and then apply to such facts the various expert opinions which have been offered. But if it is not a point of science or art, the Court or jury can form an opinion without expert evidence, though the line where there no longer remains a point of science or art on which the Court has to form an opinion is not always very clearly defined.

In a case where a contract is unopposed by the defendant on the ground of his insanity, it is open to the plaintiff to rely on defendant's conduct in transacting business in general, and, in particular, in putting through the impugned transaction as evidence of capacity. On the other hand, it is open to the defendant to show that, though he was not generally incapable, he was incapable as regards the particular contract, either on the ground that he suffered from delusions which influenced the contracts in such a way that his delusion formed the foundation of the contract, or on the ground that owing to general enfeeblement of mind he did not understand the contract in question.

A man who is suffering from delusions may very well perform acts which are not influenced by such delusions, and when it is attempted to set aside a transaction entered into by a man suffering from delusions, the Court has to decide whether the delusions influenced the disposition or contract, and, if so, to what extent.

Monosseh Jacob Monosseh v. Shapurji Hormusji Harvar, 10 Bom. L.R. 1004.

MACLEOD, J.

(2) Remuneration to a committee—Court's jurisdiction to pass the order—Next-of-kin of lunatic not entitled to be heard on the application—Lunatic when sane can impeach the order. See ACT XXXIV OF 1858 (LUNACY, SUPREME COURT), No. 1, 10 Bom. L.R. 772.

(3) Mahomedan Law—Transfer by lunatic's mother—Validity of transaction. See MAHOMEDAN LAW (ALIENATION), No. 2, 5 A.L.J. 474.

Lunacy (Supreme Courts) Act.

See ACT XXXIV OF 1858.

Mahabrahmani Offerings.

—contract with respect to—Not enforceable against heirs or representatives of parties to agreement—Immoveable property—Transfer of non-existing property. See CONTRACT, No. 2, 11 O.C. 212

Mahomedans.

—are not excluded from the benefit of S. 4, Partition Act Sec IV OF 1893 (PARTITION), No. 2, A.W.N. (1908), 126.

Mahatams of Muzaffargarh District.

—whether belong to an agricultural tribe for the purposes of the Pre-emption Act. See ACT VI OF 1905 (PUNJAB PRE-EMPTION), No. 1, 24 P.R. 1908.

Mahomedan Law

- 1.—GENERAL.
- 2.—ALIENATION.
- 3.—DEBTS
- 4.—DIVORCE.
- 5.—DOWER
- 6.—GIFT.
- 7.—GUARDIAN.
- 8.—INHERITANCE.
- 9.—LEGITIMACY.
- 10.—MARRIAGE.
- 11.—PARTITION.
- 12.—PRE-EMPTION.
- 13.—SUCCESSION
- 14.—WAKF.
- 15.—WIDOW
- 16.—WILL.
- 17.—WORSHIP.

—1.—(General)

(1) Wahabis, right of, to worship at Sunni mosques—Restrictions to its exercise—Special dedication of mosque for use of a particular sect—Validity.

Quære —Whether according to the Mahomedan Ecclesiastical Law, a mosque can be specially dedicated for the use exclusively of the Hanafi sect of Sunni Mahomedans.

Persons belonging to the *amil-bil-hadi* (or Wahabi) sect of Mahomedans are entitled to worship at mosques chiefly used by the Hanafi sect and use the loud toned *amin* and raise the hands above the knee during worship(a).

In making a declaratory decree that the plaintiffs were entitled to worship in accordance

Mahomedan Law—(Continued).**—1.—(General)—(Concluded).**

with the Wahabi rituals, the Court imposed the condition that, in exercising this right, the plaintiffs should not interrupt or disturb the worship of others. **Moulvie Abdus Subhan v. Kurban Ali**, 12 C.W.N. 289=3 M.L.T. 191=7 C.L.J. 433=35 C. 294.

BRETT AND CHITTY, JJ.

References —12 A. 493 and 18 C. 448, *relied on*.

(2) Spes successionis—Creation of life-interest—A vested remainder—Shias

The creation of life-interest is allowed among Shias. During the period of the life-interest, the deferred interest can be dealt with by way of sale, gift, or otherwise, provided there is no interference with the particular estate; and the purchaser or donee could deal with the interest so acquired by him. A Mahomedan can create a definite interest like the one known to English Law as vested remainder, and such a remainder, though liable to be displaced, is not a mere expectancy in succession by survivorship or other merely contingent or possible right of interest, but an interest that can be attached and sold (a). **Banoo Begum v. Mir Abed Ali**, 9 Bom. L. R. 1152=32 B 172.

JENKINS, C. J., AND HEATON, J.

Reference —(a) 17 I A. 201, F

(3)—Validity of ariat according to Mahomedan Law. See MAHOMEDAN LAW (GIFT), No. 1, A.W.N. (1908), 193.

(4)—, whether applicable to pre-emption based on custom. See PRE-EMPTION, No. 34, 5 A.L.J. 752.

(5)—See MAHOMEDAN LAW (GUARDIAN).

—2.—(Alienation).

(1)—See MAHOMEDAN LAW (GUARDIAN)

(2) Previous alienations, not objected to by any body, of portions of *wakf* land proved to be Mahomedan graveyard—Right of members of Mahomedan community to object to further alienation whether lost. See MAHOMEDAN LAW (WAKF), No. 3, 78 P.L.R. 1908.

—3.—(Debts).

(1) Debt by Mahomedan widow for expenses of her husband's "Chelum"—Whether binding on the reversioners. See LIMITATION, No. 4, 70 P.W.R. 1908.

Mahomedan Law—(Continued).**—4.—(Divorce).**

(1) Talaq-ul-Bidat or, irregular divorce—Re-marriage when valid after such divorce—Parties to divorce bound by rules governing them when divorce took place Husband and wife—Custody of wife not allowed when marriage illegal.

J (husband) and B (wife) followed the doctrines of the Sunni or Hanafi sect. J pronounced the formula of divorce three times consecutively and executed a deed of divorce reciting that he had given his wife three *Talaqs* and had given her up and had made her unlawful to him. He afterwards re-married her without her being intermediately married to another man.

Held, that among Sunni or Hanafi sect the *Talaq Bidat* or irregular divorce is, and becomes accomplished, when a husband repudiates his wife by uttering three times, at shorter intervals or even in immediate succession, any word addressed to the wife, clearly indicating to dissolve the marriage; and that if the woman be not *Tuhr* when the repudiation is pronounced, the divorce does not become conclusive until completion of *Iddat*.

Held also, that after the said divorce and completion of the *Iddat*, when necessary, the divorced couple cannot validly be re-married unless and until the woman was married to another man and divorced by him after consummation or left a widow at his death, and that custody of wife cannot be decreed when the marriage is illegal.

Held, further, that parties to a divorce are generally bound by the rules governing the sect to which they belonged when the divorce was pronounced (a). **Mussammatt Barkat Bibi v. Jalal Din**, 84 P.W.R. 1908=97 P.R. 1908.

SIR WILLIAM CLARK, C.J., AND REID, J.

Reference.—(a) 49 P.R. 1907=110 P.W.R. 1907, F.

(2) Marriage contract, option of talak given to wife in—Exercise of option—Delay, effect of, when not unreasonable.

When a power is given to a Mahomedan wife by the marriage contract to divorce herself on her husband's marrying again, if the husband does marry again, she is not bound to exercise her option at the very first moment she hears of the news. The injury done to her is a continuing wrong and she has a continuing right to exercise the power (a).

Mahomedan Law—(Continued).

—4—(Divorce)—(Concluded).

The rules relating to the exercise of a power of divorce given to the wife by the husband after marriage should not govern the exercise of a similar power given in the marriage contract itself.

Held, that the delay in exercising the power in this case was not unreasonable. **Sremati Ayatunnessa Bibi v. Karam Ali** 12 C.W.N. 907.

COXE AND DOSS, JJ.

References:—(a) 16 W.R. 260, F., 8 C. 327, R.

(3) Talak—Divorce—Dower—Limitation.

The absence of the wife does not make the pronouncement of *talak* (divorce) void and inefficacious.

It is necessary for the purpose of dower that the fact of the pronouncement of *talak* should come to her notice. **Ful Chand Bibee v. Nawab Ali Chowdry**, 13 C.W.N. 134.

STEPHEN AND DOSS, JJ.

—5.—(Dower).

(1) *Act No. VII of 1889 (Succession Certificate Act)*, S. 4—"Debt"—Deferred dower

Held, that the dower of a Mahomedan wife whether prompt or deferred, is a "debt" within the meaning of S. 2 of the Succession Certificate Act, 1889, and that in a suit for its recovery brought by the heirs of the deceased wife against the husband no decree can be passed in favour of the plaintiff in the absence of the certificate required by the Act. **Abdul Karim Khan v. Maqbul-un-nissa Begam**, A.W.N. (1908), 113 = 90 A. 315 = 5 A.L.J. 598.

STANLEY, C.J., AND BURKITT, J.

References.—12 C.W.N. 84, D.; 2 C.W.N. 591, diss.; L.R. 11 Q.B.D. 524, *reft. to*.

(2) Relinquishment—Acceptance by the heirs.

Under Mahomedan Law, the remission of dower by a widow, without acceptance by the heirs of her husband, is effective.

It is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises (a). **Jyanibegam Fakiroddin v. Umrav Begam**, 10 Bom. L.R. 764.

SCOTT, C.J.

References:—(a) 2 I.A. 181; (1900) A.C. 15, F.

Mahomedan Law—(Continued).

—5.—(Dower)—(Concluded).

(3) *Hiba bil ewaz—Registration—Consideration, what is sufficient—Koran, copy of—Transfer of property in lieu of dower-debt, whether gift or sale.*

A transfer of immoveable property by a Mahomedan to his wife purporting to be "made in consideration of a dower-debt of Rs. 49" and "on account of right of inheritance," was held to be a sale and as such governed by the provisions of S. 54 of the Transfer of Property Act.

It was wrongly described as a *hiba bil ewaz*.

A copy of a Koran is a valid consideration for a *hiba bil ewaz*.

Semle—S. 129 of the Transfer of Property Act excepts only gifts without consideration from the operation of the Chapter on Gifts. **Abbas Ali Shikdar v. Karim Baksh Shikdar**, 13 C.W.N. 160.

COXE AND BELL, JJ.

(4) Widow's right to hold property till dower-debt is paid. See ACT VII OF 1876 (LAND REGISTRATION, BENGAL), No. 3, 12 C.W.N. 16 = 35 C. 120

(4-a)—adverse possession of dower property. See MAHOMEDAN LAW (WIDOW).

(5) Dower prompt and deferred. See MAHOMEDAN LAW (PARTITION), No. 1, 13 C.W.N. 153.

—6.—(Gift)

(1) *Usufruct—Ariat.*

Held, upon an application for review of judgment in the case of 28 A. 264 = A.W.N. (1905), 269, that what was decided in that case was that the transfer, in question there, was not an absolute gift, so that any limitation or condition limiting it would be void under the Mahomedan Law, but that, taking the transaction as a whole, it was a grant of the usufruct of the property to Mt. Habib-un-nissa for her life, known, in Mahomedan Law, as an *ariat*. An *ariat* is not invalid according to the Mahomedan Law. **Khalil Ahmad, In the matter of the petition of**, A.W.N. (1908), 133 = 5 A.L.J. 405 = A. 309.

BANERJI AND RICHARDS, JJ.

(2)—*Validity of gift—Marz-ul-maut—Right to be applied—Practice when concurrent findings of fact are under consideration.*

Where the question was, whether a certain deed of gift made by a deceased Mahomedan donor in favour of his son was invalid by reason

Mahomedan Law—(Continued).**—6.—(Gift)—(Concluded).**

of the Mahomedan Law of *mar-ul-maut*, relating to gifts made in death-illness, and the Courts in India concurred in finding in favour of the donee, and applied the test which was treated as decisive on this point, "Was the deed of gift executed by the donee under apprehension of death," their Lordships held that the test which appeared to be the right question was essentially one of fact, and upheld the concurrent finding of the lower Courts in favour of the donee. **Fatima Bibi v. Sheikh Ahmed Buksh**, 10 Bom. L.R. 50 (P.C.).

LORD ROBERTSON, LORD COLLINS, AND SIR ARTHUR WILSON.

- (8) *Mushaa, doctrine of—applicability—Share in companies and freehold property.*

The doctrine of *mushaa* does not apply to shares in companies and freehold property in a great commercial town.

Where a Mahomedan trader in Rangoon made a gift of certain shares and other valuable freehold properties, in favour of his wife and minor children, *held*, that the gift was not invalid (a). **Ibrahim Goolan Ariff v. Saiboo**, 4 A.L.J. 572 (P.C.) = 11 O.W.N. 973 = 9 Bom. L.R. 872 = 17 M.L.J. 408 = 6 C.L.J. 695 = 35 C. 1.

LORD ROBERTSON, LORD COLLINS AND SIR ARTHUR WILSON.

Reference—16 I.A. 207 = 11 A. 460, *It*

- (4) *Hiba bil mushaa—Possession.*

Held, that what is known to Mahomedan law as a *hiba bil mushaa* or gift of an undivided joint property, is a valid gift if the donee obtains possession. **Mohib-ullah v. Abdul Khalik**, A.W.N. (1908), 104 = 30 A. 250 = 5 A.L.J. 566.

ATKMAN, J.

Reference:—11 A. 430, *R.*

- (5) Gift by Moplah Mahomedan husband to wife governed by Marumakkathayam law,—effect of. See MARUMAKKATHAYAM LAW, No. 5, 18 M.L.J. 16.

—7.—(Guardian).

- (1) *Guardianship of property of minors—Mother and paternal uncle—Preference—Guardian and Wards Act, S. 17.*

Where the only candidates for the guardianship of the property are the mother and a

Mahomedan Law—(Continued).**—7.—(Guardian)—(Continued).**

paternal uncle of the minor, there appears to be no authority for preferring the uncle. The uncle has no legal right under Mahomedan Law superior to that of the mother (a). It is for the Court to decide what appears to be for the welfare of the minor. **Jfa Zakeria v. Harun**, U.B.R. (1908), 2nd Quarter. Guardian and Wards, p. 1.

TWOMEY, J.

Reference.—(a) 29 A. 10, *F.*

- (2) *Minor, transfer of property belonging to—Guardian, validity of transfer by one who is not—Voidable and void transfers—Decree in favour of a minor subject to the payments of debts binding on him—Limitation Act, 1877, Sch. II, Arts. 44 and 144—Redemption, suit for, brought by a minor twelve years after sale—Custom, modification of law by—Contract Act, Ss. 64, 65 and 135—Ratification of a void contract—Estoppel—Ordnance Laws Act, 1876, S. 3*

Held, that, where a custom is proved to exist, it supersedes the general law which, however, still regulates all outside the custom (a).

Held, further, that the mortgage of property, belonging to a Mahomedan minor, by a person who is not his natural guardian or a guardian judicially appointed, is absolutely void, even though it may have been executed to pay off debts legally payable by the minor; the minor should not be allowed to recover the property until he has paid those debts and thus made restitution to the extent that he has derived advantage (b).

Held, also, that a suit for redemption brought by a minor is not barred if brought more than twelve years after it has been sold by one not legally competent to sell, the minor being still entitled to base his cause of action on the original mortgage.

Held, lastly, that, where a transfer is void *ab initio* it cannot be validated by subsequent ratification (c). **Mata Din Sah v. Shaikh Ahmad Ali**, 11 O.C. 1.

GREENE, A.J.C., AND CHAMIER, J.C.

References—(a) 12 M.L.A. 529 (508); 29 C. 828, *R.* (b) 9 O.C. 97; 28 B. 181, *F.*; 34 C. 36, *Ass.* (c) 8 A. 852, *R.*

- (3) *Alienation by remote guardian—Effect—Guardian being co-heir and in possession of*

Mahomedan Law—(Continued).**—7.—(Guardian)—(Concluded).**

the estate—Alienation to discharge debt—Validity.

Under the Mahomedan Law there are two classes of guardians, near and remote. The near guardians are the father, grand-father and their executors. The remote guardians are the other male agnates. The near guardians alone have authority to sell immoveable properties.

An uncle, being a remote guardian, has no authority to sell the land of his minor nephew (a). Such a sale may be treated by the nephew as a nullity, and he can recover the property sold.

No doubt, if the guardian is also a co-heir and in possession of the whole estate he represents the whole body of heirs as against the creditors of the estate and can make a valid alienation for the purpose of discharging debts of the deceased. In such a case he makes the alienation not *qua* guardian, but *qua* representative of the estate (b).

Where plaintiff seeks no equitable relief, the maxim he who seeks equity must do equity has no application (c). **Aman wd Mahomed v Yaro wd. Maluk**, 1 S.L.R. 221

PRATT, J.C., AND CROUCH, A.J.C.

References —(a) 20 B. 199, 18 A. 373, 29, C. 473, F. (b) 44 C. 65; 30 C. 539, R. (c) 20, B. 199, R.

(4) *De facto guardian—Mother—Transfer by Lunatic's benefit—Setting aside of transaction.*

When a Mahomedan mother, acting as a *de facto* guardian of her son who is a lunatic, deals with his property on his behalf and for his benefit, the transaction should not be set aside, although under the Mahomedan Law she cannot be his guardian (a). **Umml Begam v Kesho Das**, 5 A.L.J. 474 = A.W.N. (1908), 220

STANLEY, C.J., AND BANERJI, J.

References —(a) 84 C. 36; 34 C. 65, 26 A. 22, R.

(5) Mahomedan mother, right of, to guardianship of minor's property—Power to make contract or refer to arbitration on minor's behalf—Guardian *ad litem*. See CIV. PRO. CODE, No. 261, 1 Sind L.R. 160

(6) Alienation by *de facto* guardian, not being legal guardian of minor and not authorised by custom to transfer ward's property—Validity. See, LIMITATION ACT, No 53 182 P.L.R. 1908.

Mahomedan Law—(Continued).**—8.—(Inheritance).**

(1) *Custom—Mahomedan Law—Adoption—Will—Kilohi Mughals of Mudki Town in Ferozpur District following agriculture for more than a century—Inherently invalid adoption need not be impugned—Indian Limitation Act, XV of 1877, Art. 118 of second Schedule.*

Held, that Kilohi Mughals of Mudki, a town in Ferozpur District, are governed in matters of inheritance by Mahomedan Law which does not recognise adoption, and that, on account of their not living in a village, the fact of their following agriculture, raises no presumption of their having also adopted customs of agricultural tribes (a).

Held, also, that an adoption inherently invalid need not be impugned independently of the claim brought for possession of the adopter's estate after his death; and that such a claim does not become barred by limitation simply on the ground that no suit for declaration of its invalidity has been brought within six years under Art 118 of second schedule to Indian Limitation Act XV of 1877 (b)

Held, further, that, according to Mahomedan Law, a will in favour of an heir is valid up to the extent only of one-third of the testator's property. **Nizam v. Bhana**, 56 P.W.R. 1908 = 71 P R 1908.

REID, J.

References —(a) 16 P.R. 1906, C.A. No. 218 of 1906 *It and D.* (b) 86 P R 1905 (F.B.), F; 21 P W R 1907 = 1 P.R. 1907, *dis*

(2) *Shias—Succession.*

Held, that according to the Mahomedan Law applicable to the Shia sect the maternal uncle of a deceased person excludes from inheritance the grandson of his great grandfather's brother. **Nijabat Ali v. Wazir Ali**, A.W.N (1908), 149 = 5 A.L.J. 548.

BANERJI, J.

(3) *Gulfrosch City—Arawns of Lahore and Amritsar are governed by Mahomedan Law and not by customs of the Punjab Agriculturists. See CUSTOMS (PUNJAB) INHERITANCE AND SUCCESSION, No. 2, 72 P.W.R. 1908.*

(4) *Koreshis of Guliana, Rawalpindi District, Gujar Khan Tahsil, belonging to family of Pirs—Whether governed by Mahomedan Law in matters of inheritance. See CUSTOMS*

Mahomedan Law—(Continued).**—8.—(Inheritance)—(Concluded).**

(PUNJAB—INHERITANCE AND SUCCESSION), No. 1, 45 P.R. 1908.

(5) Sayyads of Tahsil Shujabad, Punjab, whether governed by Mahomedan Law of inheritance. See CUSTOMS (PUNJAB—INHERITANCE AND SUCCESSION), No. 10, 68 P.R. 1908.

(6) Laghari Bilochis of the Sanghar tahsil of the Dera Ghazi Khan District—Preference of Mahomedan Law in matters of female succession—Custom—Right of daughter to inherit her father's ancestral property in presence of his collaterals. See CUSTOMS (PUNJAB—INHERITANCE AND SUCCESSION), No. 27, 136 P.R. 1908.

(7) Right of grand-daughters when their father had pre-deceased his father. See CUSTOMS (PUNJAB—INHERITANCE AND SUCCESSION), No. 28, 136 P.R. 1908 (note case, p. 619)

(8) Bilochis of the Natkani Datam got of the Sanghar tahsil of the Dera Ghazi Khan District—Rights of daughters to succeed. See CUSTOMS (PUNJAB—INHERITANCE AND SUCCESSION), No. 29, 136 P.R. 1908 (note case, p. 622)

(9)—Inapplicable to Shamsi Khojas, Lahore, in matters of succession. See CUSTOMS (PUNJAB—INHERITANCE AND SUCCESSION), No. 31, 140 P.R. 1908.

(10) See MAHOMEDAN LAW (SUCCESSION).

—9.—(Legitimacy).

(1) *Marriage—Legitimacy—Acknowledgment of parentage—Alienation by a Sikh Jat in favour of issue from a Mahomedan woman—Declaratory suit to set aside alienation—Dismissal of suit—Appeal by some only of the plaintiffs.*

The Mahomedan Law of acknowledgment of parentage with its legitimising effect has no reference whatsoever to cases in which illegitimacy of the child is proved and established, either by reason of a lawful union between the parents of the child being impossible or by reason of marriage necessary to render the child legitimate being disproved. The doctrine relating to cases where either the fact of the marriage itself, or the exact time of its occurrence with reference to the legitimacy of the acknowledged child is not proved in the sense of the law as distinguished from disproved.

In other words the doctrine applies only to cases of uncertainty as to legitimacy and in such cases acknowledgment has its effect; but that

Mahomedan Law—(Continued).**—9.—(Legitimacy)—(Concluded).**

effect always proceeds upon the assumption of a lawful union between the parents of the acknowledged child

Held, that a gift of immoveable property by a Sikh Jat in favour of his sons by a Mahomedan wife before the alienor embraced Mahomedanism was void as the alienees could not be regarded legitimate issue.

Held, also, that where claim of reversioners to set aside an alienation is dismissed and only some of them appeal on their own behalf only, the appellate Court, if it accepts the appeal, should only grant declaration as to the right of the appellants and not the reversioner who did not join in the appeal. **Khushal Singh v. Jaimal**, 190 P.L.R. 1908.

KENSINGTON AND SHAH DIN, JJ.

—10.—(Marriage).

(1) *Fifth marriage in presence of four living wives—Legality—Legitimacy of children.*

A marriage by a Mahomedan with a fifth wife when four previous wives are living is invalid and not void, and the children born of such marriage are not debarred from succession to the estate of their father (a).

The spirit of Islam is against bastardising children. It allows in certain cases, and subject to certain qualifications and limitations, paternity to be established even by acknowledgment. The onus would therefore rest on those who alleged that a child born as the issue of a proper contract of marriage with a female, who is a fitting subject of marriage and not unfit as prohibited females are, is really illegitimate, because the number expressly permitted by the sanction of Al Koran was exceeded. **Kushaid Jan v. Abdul Hamid Khan**. 6 P.R. 1908.

JOHNSTONE AND IAL CHAND, JJ.

Reference —(a) 23 C. 130, R.

(2) Re-marriage between divorced couple, when valid after divorce. See MAHOMEDAN LAW (DIVORCE), No. 1, 84 P.W.R. 1908.

—11.—(Partition).

(1) *Partition suit, decrees in—Infants, non-parties, how far bound—Dower, prompt and deferred—Agreement by father on behalf of minor son—Evidence of intention—Khana damad—Pin-money, claim for—by heir—Limitation—Executor a trustee—Costs.*

Mahomedan Law—(Continued).**—11.—(Partition)—(Continued).**

Under the Mahomedan Law, the minor heirs of a mother not parties to a partition suit, for her share in her father's estate and continued after her death by her husband as her executor, and whose interests were not legally protected at the time of partition, are clearly entitled to have the matter gone into again. But the division, as then made, should not be disturbed more than is absolutely necessary properly to adjust the interest of the heirs.

Even if the portion of a dower that was prompt was not claimed by the wife in her life-time, the same, on her death, together with the deferred portion thereof, becomes available to her estate, vests in her executors and passes on to her heirs.

The executor of a Mahomedan takes the whole estate of the testator by virtue of the Probate and Administration Act and is a trustee for the entirety thereof (a).

When the executor of a deceased Mahomedan woman is her husband who was under an agreement to pay her a certain dower, he cannot avail himself of the ordinary period of limitation of three years as a simple debtor and avoid the payment of the dower to the heirs of the deceased.

Under the Mahomedan Law, a father has the power to make a contract for dower on behalf of his infant sons and the contract so entered into is binding, even though it was made after the marriage.

The amount named in an agreement for the payment of dower must be paid irrespective of the husband's means and the husband cannot be allowed to go into evidence to show that the parties to the contract did not mean to insist upon the payment of the dower but something else (b).

A fixed sum of money agreed by the husband, at the time of the marriage, to be paid monthly to the wife as *pan dan* (pin money) was considered to be in the nature of a personal allowance, and, if the wife failed to claim and recover the same during her life-time, her heirs could not, after her decease, recover the same from her husband as a part of the assets of her estate.

When the hearing of a partition suit was prolonged entirely on account of contentions raised by a defendant in which he failed, he was ordered, to pay to all parties the costs of

Mahomedan Law—(Continued).**—11.—(Partition)—(Concluded).**

hearing on subsequent days after the first day.
Bazir Ali v. Hafiz Nazir Ali, 18 C.W.N. 158.

CHITTY, J.

References:—(a) 9 C.W.N. 938=33 C. 11, F.
(b) 2 A. 578, F

—12.—(Pre-emption).

(1) *Manager of Court of Wards, power of, to assert the claim of pre-emption—Delay in assertion of right—Formality—Claim, when can be made—Act V of 1897 (Bengal Estates Partition), Ss. 29 and 95—Custom.*

A guardian or manager under the Court of Wards can assert a claim of pre-emption, based on the ownership of the ward's property, and such manager does not need any express sanction from the Court of Wards. He can also perform on behalf of an adult female ward the ceremonies of *Talab-i-mowasibat* and *Talab-i-ishtishad* (a).

There is no fixed time within which the *talab-i-ishtishad* should be performed. It is a question of fact for the Court to determine, whether such ceremony was done within proper time (b).

The performance of the ceremony of *talab-i-ishtishad* is not meant to be done for the information of the vendor or vendee, though its effect may be to give them information. The formality is insisted on with the object of getting evidence that the pre-emptor has really asserted his right, and because evidence is wanted in order to establish proof before the Magistrate. It may be that no witnesses are present at the time of the performance of the *talab-i-mowasibat*. The *talab-i-ishtishad* must be performed in the presence of witnesses so that there may be proof that the claim has been made (c).

The performance of the ceremony in the *Raj kachary* or law office of the vendor is a sufficient compliance with the law (d).

The existence of the custom of pre-emption among Hindus in the district of Champaran, Bihar, has been judicially recognised (e).

The assertion of the claim of pre-emption must be made without delay; but before the *shafes* can assert his right to pre-emption, he must be satisfied by evidence, which he holds to be credible, that the sale has been completed (f).

It is clear from the authorities that under the Mahomedan Law, before it can be held

Mahomedan Law—(Continued).**—12.—(Pre-emption)—(Concluded).**

that the sale was complete, there must have been a 'bessation of the vendor's right in the property (g).

An order passed under S. 29 of Act V of 1897 has not the effect of dividing the shares of the proprietor finally, until the date specified in S. 95 of the Act; and until the latter date the right of pre-emption subsists (h). **Jadu Lal Sahu v. Janki Koer**, 35 C. 575.

BRETT AND COKE, JJ.

References.—(a) 1 A. 521 and 23 A. 129, R. (b) 16 W.R. (F.B.), 13, F. (c) 17 C. 543, R. (d) 27 A. 160, diss. (e) W.R. (1864), 259, W.R. (1863), (F.B.), 143, 17 W.R. 264; (1837), 6 Sel. Rep. 197, F. (f) 11 A. 108; 16 A. 344, F. (g) 8 W.R. 255, F. (h) 12 W.R. 484, R.; 14 W.R. 476, D

(3) **Shafi Khaleet—Partner in the immunities or appendages—Nature of right—Common servient tenement between property of vendee and property in dispute**

Plaintiff pre-emptor and defendant No. 2, vendor, were brothers. Defendant-vendor sold to defendant No. 1, a neighbour, two houses adjacent to each other, and between the female apartments of which and the house of the plaintiff, there was a passage for the use of the inmates. Plaintiff sued for pre-emption as neighbour and *shafi khaleet*. The defence was that the plaintiff had no right of pre-emption in preference to that of the vendee who was a neighbour and also a *shafi khaleet*, inasmuch as the water from the privy of his house passed through the land of a third person over which land the water from the roof and *parnalas* of the houses in dispute also fell.

Held, that under the Mahomedan Law, the right of the defendant-vendee over the land of the third person was a totally different right from that of the defendant-vendor over the same land. The defendant-vendee was not a participator in any sense either in the property sold or in any of its immunities or appendages. **Musharraf Ali v. Shaukat Ali**, 5 A.L.J. 509=A.W.N. (1908), 239.

BURKITT AND RICHARDS, JJ.

(3) Unreasonable delay in making claim of pre-emption—Effect. See PRE-EMPTION, No. 19, 12 C.W.N. 419 (P.C.).

(4) See PRE-EMPTION, No. 34, 5 A.L.J. 752.

Mahomedan Law—(Continued).**—13.—(Succession).**

(1) **Evidence to prove custom at variance with it inadmissible—Bengal, N.W.P. and Assam Civil Courts Act (XII of 1887), S. 37—Beluchi Mahomedans governed by Mahomedan Law in regard to succession—Daughters entitled to inherit—Relinquishment.**

In regard to succession among Beluchi Mahomedans it was held, that, under S. 37 of the Bengal Civil Courts Act of 1887, the parties would be governed by the Mahomedan Law. Hence, evidence to prove a custom in a family excluding daughters from inheritance—such custom being at variance with the ordinary law—was inadmissible and was rightly rejected (a).

There is as much authority in the *Koran* for the daughters of a Mahomedan taking shares in their father's estate as there is in the case of sons. A deed of abandonment executed in reliance upon the generosity of the party benefited was held to be without consideration. **Ismail Khan v. Imtiaz-un-nisa**, 4 A.L.J. 792=A.W.N. (1908), 7.

STANLEY, C.J. AND BURKITT, J.

Reference.—(a) 23 A. 20, F.

(2) **Shias—Succession—Mode of descent among descendants of paternal uncles and aunts.**

Under the Shia law the succession in the case of descendants of paternal uncles and aunts is stirpital and not capital. **Aga Sheir Ali v. Bai Kulsum Khanum**, 10 Bom. L.R. 717.

JENKINS, C.J., AND BATCHELOR, J.

(3) **Shias—Descendants of paternal uncles and aunts—Succession.**

The heirs by consanguinity under the Shia Law of inheritance fall into three classes. In the first class are, first the parents, and secondly children and other lineal descendants. In the second class there are first grand parents and ascendants and secondly brothers and sisters and their descendants. And in the third class come paternal and maternal uncles and aunts of the deceased and his parents and their descendants.

In the third class, as well as in the first and second, succession is stirpital. **Aga Sheralli Yalad Aga Faisalli v. Bai Kulsum Khanam**, 32 B. 540.

JENKINS, C.J., AND BATCHELOR, J.

Mahomedan Law—(Continued).**—13.—(Succession)—(Concluded).**

(3-a) —governs Awas of Ludhiana Town in matters of succession and not custom. See CUSTOMS (PUNJAB—INHERITANCE AND SUCCESSION), No. 2, 124 P.R. 1908.

(3-b) Spes successionis. See MAHOMEDAN LAW (GENERAL), No. 2, 9 Bom. L.R. 1152.

(4)—not applicable in the case of an occupancy tenancy—Male lineal descendants—Rule of devolution altered. See ACT II OF 1901 (N.W.P. ACTS), No. 4, 5 A.L.J. 77.

(5) See MAHOMEDAN LAW (INHERITANCE).

—14.—(Wakf).

(1) Wakf nominally for pious purposes, but substantially to provide maintenance for a particular family and its descendants, validity of.

In a suit for possession the plaintiff was the cousin on the father's side of one M, the deceased owner of the property in dispute, while the defendants were the sons of her first cousin on the mother's side. It was alleged in the plaint that the plaintiff had been manager of the property of M until 1870, when the defendant's father was appointed to look after her property, that on his death his sons, the defendants, continued to act on behalf of M, and that during her life-time she executed certain deeds, one of which was a deed of Wakf, dated the 5th February, 1901. The following were the material portions of the deed. "...I desire that with the property owned and possessed by me some benevolent work may always be carried on, so that it may bring me good name in this world and salvation in the other, and the property may also remain safe. Therefore.....I have executed a perpetual deed of endowment, without the power of revocation, in respect of half the village.I have got the Wakf lawfully enforced through an agent and allotted the income of the said property to the expenses of the Imambara.....I have now endowed for ever the property for the Imambara in Sitapur, and no body can become the proprietor thereof.....I have subjected the property to the rules relating to Wakf, and, having made (the defendants) trustees of this endowed property, I have put them into possession thereof as such, because these very men are my near, nay nearest relations... So the said trustees will ever remain the trustees.....and it will be proper for them to spend whatever expenses may be incurred in connection with the

Mahomedan Law—(Continued).**—14.—(Wakf)—(Continued).**

Imambara out of the endowed property during the time of their trusteeship; and it is the duty of every one of them to incur expenses of majalis (religious meetings) detailed below. This is always to be kept in view that whoever may be appointed trustee after the said trustees will be from the family of these very trustees, no one belonging to another family can become a trustee. The said trustees will themselves nominate trustees to succeed them and likewise every trustee will make arrangement to have effect after him....." The annual income of the property exceeded Rs. 1,000, a very small portion of which was sufficient to meet the expenses of the majalis.

Held, that, in the deed, the appropriation was nominally for a pious purpose, and substantially to provide maintenance for the defendants and their descendants, and, therefore, under the Mahomedan Law the wakf was void and of no effect (a) **Hakim Muhammad Sharif v Zakir Hussain**, 11 O.C. 48.

EVANS AND CHAMIER, J. CS.

References —(a) 17 C. 498, 22 C. 619, 30 C. 666 and 23 B. 725, R.

(2) Wakf property—Burden of proof—Tukia Kutab Garhi in Lahore.

Held, that the plaintiff, on whom the burden of proof lay, had failed to prove that the *Tukia Kutab Garhi*, situate in Lahore, is wakf property; that whatever the original history of the property might have been, it had long since passed into private hands. **Mussammat Alah Jawad v. Muhammad Hassan**, 110 P.L.R. 1908 = 82 P.W.R. 1908.

KENSINGTON AND HURRY, JJ.

(3) Dedication—User—Graveyard—Alienation of land pertaining to graveyard—Ouv. Pro Code (Act XIV of 1882), Ss. 30 and 539—Suit by members of a community—Individual rights

The plaintiffs, some Mahomedans of Multan city, sued the Court of Wards representing the estate of *Khan Bahadur Mahkhum Hassan Bakhsh* for a declaration that the land in suit situate in *Mauza Taraf Daria*, Tahsil Multan, was a graveyard in the possession of the Mahomedan community, and for an injunction restraining the defendant from transferring any part of the land. It was alleged by the plaintiffs that the whole of the land in suit was the graveyard known as *Mai Pak Daman* and was wakf and inalienable.

Mahomedan Law—(Continued).**—13.—(Wakf)—(Continued).**

Held, that the plaintiffs had proved that the land in suit was graveyard known as *Mai Pak Daman* and was *wakf* by user, if not by dedication (a).

That user, as such, does not deprive the owner of his title but the title remains subject to the user of the land as *wakf* (b).

That the plaintiffs, as members of the Mahomedan community, were competent to institute the suit, and Ss. 90 and 589 of the Civ. Pro. Code did not apply to the case, that it was not necessary for each plaintiff to show that he had used the graveyard; a newcomer, for instance, if a Mahomedan, had an equal right with the oldest residents.

That, by the fact that previously some portions of the land pertaining to the graveyard had been alienated without objection on the part of any one, the plaintiffs did not lose their right to object to further alienation. *Ilahi Bukhsh v. The Court of Wards of Khan Bahadur Makhdum Hassan Bakhsh*, 78 P.L.R. 1908=52 P.W.R. 1908.

CHATTERJI AND JOHNSTONE, JJ.

References:—(a) 23 C. 1290; 19 C. 203; 25 A. 418; 2 M.I.A. 390, A.W.N (1903), p. 74, R. (b) 26 B. 198, R.

(4) *Mosque, Mahomedan Foundation—Right of worship—Exclusive right of a class—Law of Mauritius—Charter of incorporation obtained by a portion of congregation disregarding the right of the rest—Remedy of the latter—Unincorporated religious association—Right to sue—French Civil Code—Ordinance 6 of 1838, Arts. 210, 212—Sanction of Government—Criminal association—Suit to set aside scheme of management—Crown, if necessary party—Prerogative—Power of Court to settle a scheme.*

In 1852-53, some Mahomedan merchants of Mauritius purchased certain properties, purporting to act on behalf of the whole Mahomedan congregation of the place, and founded a mosque. Thereafter, from time to time, adjoining properties were bought and added to the mosque by Mahomedan merchants, purporting to act in the same way on behalf of the whole Mahomedan community. In 1877 and on subsequent dates, several purchases of properties were made by Cutchee merchants purport-

Mahomedan Law—(Continued).**—14.—(Wakf)—(Continued).**

ing to act on behalf of the Cutchee Mahomedans alone, but this practice was not consistently followed in later times, and though the Cutchees, being the richest members of the congregation, contributed individually in proportion to their means, considerable contributions were also made in the aggregate by the Hallaye and Soortee Mahomedans. The administration of the affairs of the mosque was left mainly, if not entirely, in the hands of Cutchee Mahomedans, because they were leading merchants, but not because they belonged to that particular class of Mahomedans. In 1893, 93 Cutchees executed deeds, forming themselves into a society (which they subsequently had incorporated) consisting of Cutchee Mahomedans alone and excluding the other classes for all future time from membership of the society and the management of the mosque, for which purpose they appointed a committee of management out of their own body with extensive powers of selling and letting properties other than the mosque and its accessories. All the properties they declared to have vested exclusively in the society.

Held, that a portion of the congregation had no right, by forming a new association, to transfer all the property to the new association and exclude the rest of the congregation from membership and from participation in the management of the affairs of the mosque. The charter of incorporation obtained by the defendants did not legalise their position, as the only association which could claim to be legalised was the congregation on whose behalf the mosque had been founded.

That the rule laid down in the French Civil Code (which is in force in Mauritius), that a religious community does not constitute a "civil person" and cannot, without being authorised by the State, hold property, has not always been carried out to its logical conclusions, and the Court will grant relief to aggrieved members of an unauthorised religious community against their fellow-members.

That, having regard to the existing law of Mauritius, the Court, in setting aside the deeds and the scheme of management set up by the defendants, could not proceed to frame a new scheme of management such as would be entirely free from legal objections. In th

Mahomedan Law—(Continued).**—14.—(Wakf)—(Concluded).**

absence of any reason to fear that the restoration of the *statu quo' ante* would lead to maladministration, this should be left to the congregation to be settled amicably, and to be given effect to, by obtaining a charter of incorporation.

That, in a suit by some of the aggrieved Hallayes and Soortees to set aside the deeds set up by the defendants, the Crown was not a necessary party, as the law of Mauritius does not require that the Crown should be impleaded, and the prerogatives of the Crown would not be affected by the decision in the suit.

That, in any case, the objection, that the Crown had not been made a party, ought to have been taken in the lower Court.

Quaere—Whether a congregation, formed for the purposes of prayer and religious worship, requires the sanction of the Government, so that, without such sanction, it becomes an illegal association, in the sense of being criminal, within the meaning of Arts 210 and 212 of the Ordinance 6 of 1838? **Ibrahim Esmael v. Abdool Carrim Peermamode**, 13 C.W.N. 26 (P.C.)=4 M.L.T. Special, p. 25.

LORD MACNAGHTEN, LORD ATKINSON, SIR J. H. DE VILLIERS, SIR ANDREW SCOBLE, AND SIR ARTHUR WILSON.

(5)—Property, validity of decree directing sale of. See CIV. PRO. CODE, No 158. 18 M.L.J. 21.

—15.—(Widow).

(1) *Widow in possession of property in lieu of dower—Loss of possession by widow—Adverse possession by stranger.*

The widow of a deceased Mahomedan obtained possession in lieu of her dower of certain property which had been of the deceased in his life-time. She, however, lost possession, and the property was held adversely for more than twelve years by a person who was a stranger to the family. *Held*, on a suit by the representatives of the sisters of the deceased claiming their shares by inheritance, that the suit was barred by limitation. **Aley Ahmad v. Muhammad Owais Khan**, A.W.N. (1908), 286=5 A.L.J. 715.

AIKMAN AND KARAMAT HUSAIN, JJ.

References:—10 A. 243 and 12 C. 594, R.

Mahomedan Law—(Continued).**—16.—(Will).**

(1) *Shias—Power of devise amongst Shias.*

Amongst Mahomedans of the Shia sect a testator can leave a legacy to one of his heirs so long as that legacy does not exceed one-third of his estate, and such a legacy will be valid without the consent of the other heirs. Where, however, the legacy exceeds one-third of the estate, it will not be valid to any extent unless the consent of the heirs, given after and not before the death of the testator, has been obtained (a). **Fahmida Khanum v. Jafri Khanum**, A.W.N. (1908), 55=5 A.L.J. 169=30 A. 153.

STANLEY, C.J., AND BURKITT, J.

References.—(a) 2 M.H.C.R. 350; 2 Morley's Dig. 120 and 3 I A. 291, R.

(2) *Bequest to legal sharers—Power of disposing one-third of the property—Bequest to trustees for charitable purposes—Void for uncertainty of subject-matter.*

Where, under the will of a Mahomedan testator, the widows have received more than they are entitled to, under Mahomedan Law, as legal share, i.e., one-eighth of the estate, a decree for the balance over and above their share should be passed against them.

Mahomedan Law permits a very wide scope to a testator as regards the one-third of his property which he may dispose of by will. His power of disposition for expenditure on charitable or religious purposes is subject to very slight restrictions.

Bequest of property by a Mahomedan testator for such charitable objects as the trustees appointed under the will may think proper, or for such purpose as that by which the testator may obtain eternal bliss, though valid under Mahomedan Law, is, on general principles applicable to all testators, inoperative and void on account of uncertainty of the subject-matter of the trust (a). **Shahab-ud-din v. Sohan Lal**, 75 P.R. 1907=168 P.L.R. 1908=139 P.W.R. 1907.

ROBERTSON AND LAL CHAND, JJ.

References:—(a) 22 B. 774; 23 B. 725; 30 B. 500; 31 C. 895; 9 Ves 399 and L.R. 8 Ch. D., 854, R.

(3) *Will in favour of heir—Valid only to the extent of one-third of testator's property.* See MAHOMEDAN LAW (INHERITANCE), No. 1, 56 P.W.R. 1908.

Mahomedan Law—(Concluded).**—17.—(Worship).**

See **MAHOMEDAN LAW (GENERAL)**, No. 1, 12 C.W.N. 289.

Maintenance

(1)—of Hindu widow—Calculation—Right of testator to limit right and amount of—Residence—Restriction as to place of—Just cause for disregarding restriction. See **HINDU LAW (WILLS)**, No. 5, 12 C.W.N. 808.

(2) Widow having fund from her husband's estate to maintain her for five years—Suit for arrears of maintenance premature. See **HINDU LAW (WIDOW)**, No. 15, 10 Bom. L.R. 770.

(3) Maintenance grant subsisting during the lifetime of the grantees, unless otherwise provided for. See **SANAD**, No. 1, 7 C.L.J. 202.

Majority.

Age of—Removal of certificated guardian, effect on attainment of majority by minor. See **GUARDIAN AND MINOR**, No. 4, 11 O.O. 159.

Malabar Compensation for Tenants' Improvements Act.

—See **ACT I OF 1887 (MADRAS)**.

Malabar Law (Tarwad).

(1) *Decree against Karnavan in respect of debt binding on members of—Division of, into tavazis subsequent to decree and prior to execution proceedings—Karnavan of original tarwad ceasing to represent members, effect of.*

The members of a tarwad cannot escape liability for debts or decrees binding on the tarwad by dividing into two tavazis (a). But, when the Karnavan of the original tarwad has ceased to represent them, they cannot be bound by proceedings, in execution of a decree against him, unless they are separately represented (b). **Komiyaprath Chathoth Yachil Kimhi Kannon v. Mannayatha Suppi**, 3 M.L.T. 189=18 M.L.J. 182.

BENSON AND WALLIS, JJ.

References:—(a) 2nd App. No. 1323 of 1894, Madras High Court, and 18 M. 451, F. (b) 14 M. 29, R.

(2)—See **MAHUMAKKATHAYAM LAW**.

Maladministration.

—by executrix does not justify Court of Wards taking possession. See **COURT OF WARDS**, No. 1, 12 C.W.N. 1065.

Malice.

Defamation—Communication privileged—What constitutes malice—Proof of malice. See **DEFAMATION**, No. 1, 83 R.R. 1908.

Malicious prosecution.

(1) *Suit for damages—Information to police—Informant engaging pleader to prosecute—Reasonable and probable cause—Conviction of plaintiff by Court of first instance if conclusive.*

Where a person gives false information to the police, he cannot escape liability for the natural and intended consequences of the act, merely because there was a subsequent investigation and the prosecution was set in motion by the police. When, further, he is found to have conducted the prosecution by engaging a pleader and a mukhtear, it cannot be urged that the police, and not he, was responsible for the prosecution.

A person cannot be held liable for damages for malicious prosecution, if it is not found that there was want of reasonable and probable cause, or that the circumstances of the case were such as to be in the eyes of the Judge inconsistent with the existence of reasonable and probable cause for the prosecution.

The fact that the plaintiff was convicted by the Court of first instance and was only acquitted on appeal ought to be considered in determining whether there was reasonable or probable cause, but it cannot be regarded as conclusive in favour of the defendant. **Bhula Chand Patro v. Palun Bas**, 12 C.W.N. 818 (note)

BANERJEE AND GHOSH, JJ.

(2)—*Suit for damages—Prosecution started by police upon information from defendant—Real prosecutor liable*

A private individual, upon whose information to the police a prosecution was started, cannot escape liability for damages for malicious prosecution by urging that the police, and not he, prosecuted, if it appears that he himself was the real prosecutor. (a) **Haril Charan Sant v. Kallash Chandra Bhuyan**, 12 C.W.N. 817.

MACLEAN, C.J., AND DOSS, J.

References:—(a) 12 C.W.N. 818 (note), and 9 Com. Bench. Rep. N.S. 505 (583), R.

(3) *Suit for—Information to police—Prosecution by police, instigated and conducted by private individual—Real prosecutor liable—Question of fact—Malice.*

Malicious prosecution—(Concluded).

A suit for damages for malicious prosecution may lie against a person, who makes a false report which results in a prosecution, or who instigates the police to send persons up for trial, or who conducts the case against those persons when sent up for trial.

The question in all cases of this kind must be—who was the prosecutor? And the answer must depend upon the whole circumstances of the case. The mere setting of the law in motion is not the criterion. The conduct of the complainant before and after making the charge must be taken into consideration. Nor is it enough to say that the prosecution was instituted and conducted by the police.

Whether or not in any case, the prosecution was instituted and conducted by the police is a question of fact.

The foundation of the action is malice, and malice may be shown at any time in the course of the inquiry.

If a complainant does not go beyond giving what he believes to be correct information to the police, and the police, without further interference on his part (except giving such honest assistance as they may require), think fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution (a). **Pandit Gaya Parshad Tewari v. Sardar Bhagat Singh**, 12 C.W.N. 1017 (P.C.).

LORDS ROBERTSON, ATKINSON, COLLINS, SIR ANDREW SCOBLE AND SIR ARTHUR WILSON.

Reference.—(a) 26 M. 362, considered.

(4) Suit for damages caused by—Want of probable and reasonable cause—Malicious intention. See ACT X OF 1889 (PORTS), No. 1, 1 Sind L.R. 201.

Malikana allowance.

(1) Suit for recovery of arrears of—lies in Civil Court and Art. 132, Limitation Act, governs it. See ACT II OF 1901 (AGRA TENANCY), No. 11, A.W.N. (1908), 209.

(2)—, claim for—Land Registration Act (VII of 1876), S. 78—Malikana, not rent. See ACT VII OF 1876 (LAND REGISTRATION), No. 7, 8 C.L.J. 300

Mamlatdar's Courts Act.

(1)—See ACT III OF 1876 (BOMBAY).

(2)—See ACT II OF 1906 (BOMBAY).

Mandamus.

Writ of—Suit in the nature of application for—Conditions for granting relief. See CORPORATION, No. 1, 12 C.W.N. 825 (P.C.).

Maps.

(1) Evidentiary value of Revenue Survey Maps. See POSSESSION, No. 2, 12 C.W.N. 273.

Market value.

—See ACT I OF 1894 (LAND ACQUISITION).

Marriage.

(1) *Presumption of its existence arising from cohabitation with habit and repute—Conditions precedent to its application—Practice—Point not submitted to either Courts in India raised before the Privy Council.*

Before applying the general presumption of marriage arising from cohabitation with habit and repute, it is necessary to make sure that there are the conditions necessary for its existence, viz., first, there must be some body of neighbours, many or few, or some sort of public, large or small, before repute can arise, and second, the habit and repute, which alone is effective, is habit and repute of that particular status which, in the country in question, lawful marriage.

Their Lordships of the Judicial Committee were unable to entertain a point urged by the appellants, the same having been submitted, in the conduct of the case, to neither Court below. **Ma Ween Di v. Ma Kin**, 10 Bom. L.R. 41 (P.C.).

LORD ROBERTSON, LORD COLLINS, AND SIR ARTHUR WILSON.

(2) *Jats—Husband executing deed repudiating wife in favour of another—Subsequent revocation of deed by husband—Suit by wife for declaration that husband and transferee have no conjugal rights against her, maintainability of—*

A Jat wife, sometime after she was married to the first defendant, her husband, left his house; he instituted a complaint, under S. 498, I.P.C., which was dismissed in consequence of his failure to trace her. Immediately after, in the excitement of the moment, he executed a deed of repudiation whereby he transferred his wife to the second defendant, but tore up the document on cooler consideration. In a suit by the wife for a declaration that neither her husband, the first defendant, nor the transferee, the second defendant, have conjugal rights against her.

Marriage—(Concluded).

Held, that such a suit would lie (a) and that the plaintiff was entitled to a declaration that the second defendant had no conjugal rights against her, but that, under the circumstances of the case, without more definite material to go on in support of the wife's contention and the plaintiff having made out no clear and public repudiation of herself by her husband (b), the suit as against the first defendant should stand dismissed. **Ishri v. Wadhawa**, 31 P.R. 1908=76 P.W.R. 1908=152 P.L.R. 1908.

ROBERTSON AND KENSINGTON, JJ.

References—(a) 26 P.R. 1908, R. (b) 88 P.R. 1906; 5 C. 500; 10 B. 301; 13 A. 126, R.

(3) *Nullity of—Deceased wife's sister—Illegitimate child—Maintenance.*

In a case, where a decree for nullity of a marriage is decreed, on the ground that the wife happened to be the sister of the deceased wife of the husband, the child would be the illegitimate child of the wife, who would be entitled, unless a strong case is made out for the contrary, to the custody of the child.

Maintenance for a child may be rightly and properly spent for the purpose of maintaining a joint home for the infant and his, or her parent, and an account of the amount allowed for the maintenance will not be ordered so long as the infant is properly maintained. **Bom Setsch v. Bom Setsch**, 35 C. 381.

FLETCHER, J.

(4)—taking place fifty years ago between *Rajput* and *Khatri* woman—Woman recognised as married wife—Her son recognised as legitimate issue by alleged husband—held proved. See **HINDU LAW (MARRIAGE)**, No. 1, 64 P.L.R. 1908.

(5)—See **RESTITUTION OF CONJUGAL RIGHTS**.

(6)—See **DIVORCE**.

(7)—See **HINDU LAW, BUDDHIST LAW, MUHAMMEDAN LAW**.

Marshalling.

Bona fide purchaser for value of part of the lands comprised in prior mortgage—Right to insist on other lands being sold first. See **TRANSFER OF PROPERTY ACT**, No. 23, 3 M.L.T. 297.

Marumakkathayam Law.

(1) *Acquisition in the name of Karnavan, presumption a quo.*

Marumakkathayam Law—(Continued).

The presumption of law is that the acquisitions of a Karnavan are presumably made out of tarwad funds.

This does not mean that a Karnavan cannot make self-acquisitions, but merely raises a presumption which is rebuttable. **Padmanabhan Govindan v. Kora Kora**, 23 T.L.R. 61.

GOVINDA PILLAY AND HUNT, JJ.

References—14 T.L.R. 191, F, 18 T.L.R. 5, D.; A. S. 69 of 1081, R.

(2) *Decree for money against the junior members—Attachment of Tarwad properties—Remedy of tarwad—Attachment before judgment, effect of—Limitation.*

Plaintiff sued to set aside the attachment and, proclamation of the plaint properties. The defendant obtained a money decree against certain junior members of a tarwad and attached the tarwad properties in execution of such decree. The Karnavan was also impleaded as a party defendant as the representative of a deceased junior member. It was found that the decree expressly exonerated the tarwad properties from liability. **Held** that the plaintiff's remedy was by way of separate suit, and not by way of application under S. 238, C P C.

Although, ordinarily speaking, an attachment subsists till set aside or is terminated by reason of limitation, attachment before judgment stands on a slightly different footing, viz., that the decree subsequently obtained must be capable of execution by the attachment already obtained, in other words, the attachment depends upon the decree for its further validity. If the decree extinguishes the alleged liability, the attachment becomes *ipso facto* void. It was therefore held that the question of limitation did not, in the circumstances of the case, arise. **Sankaran Narayanan v. Kanaku Sankaranarayanan**, 23 T.L.R. 57.

HUNT AND MUTTUNAYAGAM PILLAY, JJ.

References—22 M. 181, 23 M. 361; 17 B. 49, 13 T.L.R. 149, *dis.*; S.A. 194 of 1079, 11 B.L.R. 149; 30 C. 134; 23 A. 346 (350).

(3) *Ex parte decree against karnavan—Right of Seshagars to contest validity of the ex parte decree in a fresh suit.*

Where an uncontested decree has been obtained against a karnavan of a Marumakkathayam tarwad, the Seshagars should be given an

Marumakkathayam Law—(Continued).

opportunity in a fresh suit to prove that the debt did not exist or was not binding on the tarwad. Such right exists even if there was no fraud, collusion or treachery. **Krishna Sas-triyal Padmanabha Sas-triyal v. Kochen Ma-theru**, 23 T.L.R. 41.

GOVINDA PILLAY AND MUTTUNAYAGAM
PILLAY, J.

Reference:—21 T.L.R. 41, H.

(4) *Manager of tarwad, powers of—Appoint-ment of manager under family Karar—Duties of creditor dealing with such manager—Principal and agent.*

A family Karar authorised a member of the tarwad to make alienations of the family property for the discharge of certain debts specified in the Karar. The member made certain alienations under the Karar, but failed to discharge the debts specified in the Karar out of the proceeds of such sale

In a suit by the plaintiff for setting aside the alienation and for the removal of the manager from karnivasthanom, to which he became entitled after the Karar, it was held,

(1) that the alienations were binding on the other members only to the extent to which the sale proceeds have been applied for the purposes mentioned in the Karar,

(2) that the creditor was bound to show that consideration passed for the sale and that the sale proceeds were utilized for the discharge of debts mentioned in the Karar.

The ordinary presumption attaching to alienations made by karnavan does not arise in the case of a mere manager acting under limited powers.

Whenever an authority purports to be derived from a written instrument, a third party dealing with the agent is bound to take notice that there is a written instrument, and he ought to call for and examine the instrument itself to see whether it justifies the act of the agent. And if from his omission he should encounter a loss from the defective authority of the agent it is properly attributable to his own fault, since he must know that he has no other security than his reliance upon the good faith and credit of the agent **Kauli Lakshmi v. Kannan Paramaswarun**, 23 T.L.R. 1.

T. SADASIVA Aiyar, C.J., AND HUNT, J.

References:—26 C. 761; S.A. 284 of 1069; O.S. 758 of 1074, R.

Marumakkathayam Law—(Concluded).

(5) *Gift by Mahomedan husband to wife governed by Marumakkathayam law, effect of.*

Where a moplath (Mahomedan) made a gift of land to his wife, who belonged to a tarwad governed by the Marumakkathayam law, held, that the land became the exclusive property of the woman and her children with the incidents of tarwad property (a). **Pattatherunath Chet-tumindalakath Parkum Siyali Kundy Thaye-thukandy Pathumma v. Mannam Kunniyal Parkum Siyali Kundy**, 18 M.L.J. 16=31 M. 228=4 M.L.T. 82

WHITE, C.J. AND WALLIS, J.

References:—(a) 16 M. 201 (F.B.); 29 M. 322, F; 22 M. 494 and 27 M. 77, R

(6)—See MALABAR LAW

Marwat grant.

(1) *Marwat grant, not an under-proprietary right—Rent Act, Oudh, S. 3.*

Held, that a marwat grant is not an under-proprietary holding as defined in the Oudh Rent Act (a) **Swami Dayal v. Lachmin Koer**, 11 O.C. 240.

EVANS, J C

Reference:—(a) 11 C. 318, R.

Master and servant *

(1) *Contract of hiring providing for payment of certain wages—Discontinuance of business—Master liable to pay the wages agreed upon, whether he find work for the servant or not—Action for damages.*

Where the contract of hiring provides for the payment of certain wages (not in proportion to the work done), although it may be optional on the part of the master to find work and he may, if he pleases, discontinue his business, yet he must nevertheless pay the wages agreed upon, whether he find work for the servant or not, or he will render himself liable to an action for such damages as a jury may think proper to give. This is the English Law on the subject. In the absence of any special Indian Law, this law may fairly be applied. This also appears to be in accordance with equity and good conscience.

In all such actions the servant seeks compensation, not for services he has rendered previous to his discharge, but for the injury he has sustained by such discharge in not being allowed to serve and earn the wages agreed on. The amount of damages must depend on the nature of the contract and the amount of wages agreed to be paid. If there were an express agreement for a month's notice it might be only a month's

Master and Servant—(Concluded).

wages. But, generally speaking, in England, the amount of damages is a question for the jury to determine. *Nga Maung Gyl v. Ramsan Ali*, U.B.R. (1908), 2nd Quarter, Master and Servant, p. 1.

TWOMEY, J.

Maurasidar.

The term, whether conveys the idea of a right to fixity of rent—*Durmaurasi mohurari* implies fixity of rent. See COMPENSATION, No. 1, 7 C.L.J. 284.

Memorandum of Association.

Memorandum and Articles of Association—What do they embody—Whether they constitute contract between company and its promoters. See COMPANY, No. 1, 10 Bom L.R. 141

Memorandum of objections.

Costs—Withdrawal of appeal. See PRACTICE, No. 16, 4 M.L.T. 482.

Merchandise Marks Act

—See ACT IV OF 1899.

Merchant Shipping Act.

—See ACT V OF 1883.

Merger.

(1) *Under-proprietor acquiring superior proprietary right—Merger.*

Where an under-proprietor acquired the superior-proprietary rights by inheritance, held, that the under-proprietary tenure ceased to exist from that date (a). *Razawand Singh v Jagole*, 11 O.C. 183.

EVANS, J.C

References—(a) 33 C. 1212 and 5 C. 198, R.

(2) Same person holding the two estates of *malik-makbuz* and *malguzar*, whether causes merger. See ACT XVIII OF 1881 (O.P. LAND REVENUE), No. 1, 4 N.L.R. 2.

Mesne profits.

(1) *Assessment—Zerail land—Possession before trespass, character of—Assessment upon produce—Net produce to be considered—Customary and competition rent.*

Dispossession of proprietor's *zerail* land. Principles for assessing mesne profits discussed.

The character of possession before trespass should be ascertained to arrive at the true measure of damages, because such possession is a fair index of intention as to the mode of occupation, if there were no trespass.

Mesne profits—(Continued).

The character of the land and its use for a long series of years indicating that the plaintiff, if he had been in possession, would have used the land for cultivating it himself with ordinary food crops.

Held, that, mesne profits, should, be assessed on the basis of produce and not rent.

If the defendant used the land to suit his own fancy, if he did not use it in the most advantageous way, if he took the risk of cultivating it with indigo on the chance of getting high profits by manufacturing indigo, or if he adopted the more comfortable use of the land by letting it to tenants, and was satisfied with a comparatively small income, the plaintiff ought not to be a loser thereby. He must not suffer for the indolent or speculative conduct of a trespasser (a).

The difficulties of ascertaining mesne profits on the basis of produce adverted to.

The net and not the gross produce is the true measure of damages

The resultant net produce, after taking into account the costs of production and the risks of the agriculturists differs very little from competition or rack rent. Assuming complete freedom of competition, the rent paid by a tenant at will would practically coincide with the whole net produce of any given piece of land

Customary rents paid by most of the *raiyats* in a village tend to keep down the rent of *zerail* lands. *Pundit Luchmi Narayan v. Sheikh Mazhar Hassan*, 12 C.W.N. 650.

MITRA AND CASPERNIZ, JJ.

References—(a) 12 C.W.N. 285=7 C.L.J. 197, 6 C.W.N. 409; 6 C.W.N. 732; 30 C. 536, R.

(2) *Mesne profits, decree for—Satisfaction—Apportionment—Contribution.*

When a decree for mesne profits was satisfied by some out of the entire body of persons liable thereunder by payments made from time to time, and a question arose as to the principle which would regulate contribution amongst the parties themselves.

Held, that the correct principle was to allow interest on the sums paid from the date of payment, and then to apportion rateably the whole sum crediting interest on each amount paid in favour of the party on whose behalf it was paid,

Mesne profits—(Continued).

from the date of payment until the final satisfaction of the decree for mesne profits (a). **Guru Prasanna Lahiri v. Jotindra Mohun Lahiri**, 7 C.L.J. 444 (P.C.).

LORD ROBERTSON, LORD COLLINS AND SIR ARTHUR WILSON.

Reference:—(1) 31 C. 597, explained.

(3) *Omission to take possession of lands on partition—Subsequent suit for mesne profits against person who was in possession.*

Plaintiff acquired an interest in the property of the first defendant. That property fell to the share of the first defendant at a division between him and the other defendants. The plaintiff, without taking possession of the first defendant's interest, immediately contested the fairness of the division between the first defendant and defendants 2 to 11, and, after the disposal of those proceedings, sued defendants 2 to 11 for mesne profits, alleging that the property claimed by him was in possession of the defendants 2 to 11 during the pendency of the said proceedings. *Held*, the plaintiff was entitled to mesne profits from defendants 2 to 11, notwithstanding the fact of his omission to take possession of the lands in the first instance before resorting to the proceedings he took. **Chudru Sattaya v. Thinulah**, 18 M.L.J. 217.

WHITE, C.J. AND MILLER, J.

(4) *Mesne profits, application for ascertainment of—Dismissal for default—Fresh application—Limitation.*

Where more than thirty days after an application for ascertainment of mesne profits was dismissed for default, a fresh application was made for that purpose.

Held, that the application was not barred. Applications for determination of mesne profits are applications for execution of the decree in which they were granted, and the striking off of such cases does not finally decide them, or prevent the decree-holder from making a further application for the determination of mesne profits. There is no substantial distinction between an order striking off an application and one dismissing it for default. **Upendra Chandra Singh v. Sakhi Chand**, 12 C.W.N. 3=7 C.L.J. 301.

RAMPINI AND SHARFUDDIN, JJ.

(5) *Decree for restitution of property silent as to mesne profits—Mesne profits, ascertainment of, in execution department—*

Mesne profits—(Continued).

Orders of His Majesty in Council, power to give effect to—Inherent powers of Court—Civ. Pro. Code, S. 583.

Held, that Courts in this country have inherent powers to give effect to orders of His Majesty in Council (a).

Held further that, where a decree orders restitution of property but is silent as to mesne profits, the Court, whether by virtue of S. 583, Civ. Pro. Code, or by reason of its inherent powers, can order execution for mesne profits (b). **Rajendra Bahadur Singh v. Raghubans Kunwar**, 11 O.C. 235.

CHAMBER AND GREEVEN, J.CS.

References.—(a) 34 C. 860, 29 A 143, R. (b) 7 M.L.A. 238; 21 C. 989, R., 2 I.A. 219; 5 C.L.R. 189, D.

(6) *Suit for—Limitation Act, Sch. II, Arts. 109, 120, applicability of—"When the profits are received" in Art. 109, meaning of.*

Where the defendants wrongfully received profits which were actually receivable by the plaintiff but for an illegal *putni* sale which was afterwards set aside, the period of limitation is three years from the time when the profits were received.

By the clause "where the plaintiff has been dispossessed by a decree afterwards set aside on appeal, when he recovers possession" in the third column of Art. 109, the Legislature limits the conditions under which the ordinary rule of three years may be extended.

The clause "when the profits are received" in the third column of Art. 109 means "when the profits are actually received" (a). **Peary Mohun Roy v. Khelaram Sarkar**, 8 C.L.J. 181=13 C.W.N. 15=4 M.L.T. 419=35 C. 996.

MITRA AND BELL, JJ.

References.—(a) 19 C. 267, expl., and 10 C. 785 (P.C.), R.

(7) *Subsequent suit for—not barred by the filing of prior suit for possession.* See CIV. PRO. CODE, No. 63, 4 M.L.T. 192.

(8)—, liability of idol for trespass by Shebait. See RELIGIOUS ENDOWMENTS, No. 1, 12 C.W.N. 550.

(9) *Claim for mesne profits, where limited owner sells without legal necessity.* See HINDU LAW (ALIENATION), No. 18, 12 C.W.N. 398.

Mesne profits—(Concluded).

(10)—of *Khamar* land, principle of assessing. See CIV. PRO. CODE, No. 112, 12 C.W.N. 285.

(11) See CIV. PRO. CODE, No. 118, 85 C. 1017.

Minor.

(1) Contract made on behalf of minor belonging to joint Hindu family by persons of full age—Effect. See CIV. PRO. CODE, No. 319, 5 A.L.J. 14.

(2) Moveable property of—pawnd by trustee allowed to retain possession after minority—entitled to redeem articles so pawnd. See CONTRACT ACT (IX OF 1872), NO. 33, A.W.N. (1908), 57.

(3) Person below age of puberty cannot be appointed mutwali. See RELIGIOUS ENDOWMENTS, No. 5, 8 C.L.J. 196

(4)—See GUARDIAN AND MINOR

(5)—See ACT VIII OF 1890 (GUARDIANS AND WARDS).

(6) Decree in partition suit—Infants not parties, how far bound—Agreement by father on behalf of minor sons for payment of dower, how far binding. See MAHOMEDAN LAW (PARTITION), No. 1, 13 C.W.N. 153

Misjoinder.

(1)—of parties—Multifariousness—Civ. Pro. Code, Ss 16, 19—Suit by heir to recover property from co-heir and transferees from him—Property situate in different districts—Compromise of part of claim—Jurisdiction. See CIV. PRO. CODE, No. 38, A.W.N. (1908), 235.

(1-a) Ss. 26, 28, 32 and 53 of the Civ. Pro. Code—Suit for redemption—Mortgagor and his transferees of a portion of the mortgaged property can sue together for redemption—Joinder of causes of action and parties. See CIV. PRO. CODE, No. 46, 9 P.W.R. 1908

(2) Suit for partition by some of several *Melvaramdars*—*Kudvaramdars* made parties to the suit, whether bad for misjoinder. See CIV. PRO. CODE, No. 52, 18 M.L.J. 85.

(3) Suit for the recovery of possession of property belonging to a religious institution, with mesne profits realised therefrom—Suit, whether bad for misjoinder of causes of action. See LIMITATION ACT, No. 104, 35 P.W.R. 1903.

(4)—whether cured by S. 578, Civ. Pro. Code—Damage to two persons by same tortious act—Right to sue as joint plaintiffs—English Law. See CIV. PRO. CODE, No. 380, 1 Sind L.R. 181.

Misjoinder—(Concluded).

(5) Suit by wife to recover possession of land alleged to have been given to husband by husband's father—Joining of children as plaintiffs improper. See GIFT, No. 1, 14 Bur. L.R. 30.

(6) Whether misjoinder of parties and cause of action, "a cause of a like nature" within the meaning of S. 14, Limitation Act. See LIMITATION ACT, No. 17, 12 C.W.N. 473.

(7) Suit by ward against guardian—Cause of action arising from guardian's malversation and from ward's rights to account and recovery of property—persons to whom property sold and who were in possession of it impleaded as co-defendants with guardian in one suit—whether any misjoinder made. See CIV. PRO. CODE, No. 49, 3 M.L.T. 286

Misrepresentation

—if invalidates administration bond. See GUARDIAN AND MINOR, No. 3, 12 C.W.N. 481.

Mistake.

(1) —, if invalidates administration bond. See GUARDIAN AND MINOR, No. 3, 12 C.W.N. 481.

(2) Inherent power of Court to correct its own mistake—Amendment of sale certificate—Sale certificate including a property not sold—Civ. Pro. Code, S. 244. See CIV. PRO. CODE, No. 148, 12 C.W.N. 1027.

(3) Parties agreed as to sale and purchase of particular goods—Whether defendant's mistake as to their quality will invalidate contract. See CONTRACT ACT, No. 28, 10 Bom. L.R. 1113.

(4) Order made upon mistake of law, whether will operate as *res judicata* in subsequent proceedings, not affecting previous order. See CIV. PRO. CODE, No. 121, 4 M.L.T. 233.

Mokurari.

—settlement of *Kamat* land—Effect. See ACT VIII OF 1869 (LANDLORD AND TENANT), No. 1, 12 C.W.N. 436.

Money.

(1) Suit for money paid to decree-holder privately and again in execution proceedings is maintainable. See CIV. PRO. CODE, No. 155, 5 A.L.J. 475.

(2) Money decree obtained by mortgagee, disclaiming all interest in his mortgage—precluded by S. 99 of the Transfer of Property Act from bringing mortgaged property to sale

Money—(Concluded).

in execution of such decree—but otherwise after completion and confirmation of such sale. See TRANSFER OF PROPERTY ACT, No. 68, A.W.N. (1908), 49.

Mortgage.

1. GENERAL.
2. ACCOUNTS.
3. CONDITIONAL SALE.
4. EQUITABLE.
5. FORECLOSURE.
6. REDEMPTION.
7. SUB-MORTGAGE.
8. USUFRUCTUARY

—1.—(General).

(1) *Inherited property of one's paternal grandmother—rule of the Dhammathats as to such property—whether the rule is that the party by whom it is inherited has a superior right in the inherited property to the other party—and why—what is the share of the inheriting party in case of divorce by mutual consent—and why—Mortgages effected by husband of paternal grandmother after her death—whether grandson on redeeming mortgaged property is bound to pay the whole amount due on such mortgage or only amount proportionate to his share.*

Maung Aung Mayat sued for a $\frac{1}{3}$ share of the inherited property of his paternal grandmother, Ma Ka, the said property consisting of four holdings of land shown in the maps and aggregating to 4.72 acres

The lower Courts agreed in finding that the land in suit, 4.72 acres or 17 *yauk-seiks*, was all acquired by Ma Ka by inheritance during her coverture with Maung Sa.

Plaintiff-respondent, who is still a minor, is the only grandson of Ma Ka and Maung Sa, who had three children, two of whom died without issue. The eldest son, Aung Pyo, had one son, plaintiff. Ma Ka died about 25 years ago; Aung Pyo died about 13 years ago and Maung Sa about 11 years ago.

It was argued that the suit was barred by limitation, as it was said that Aung Pyo had 12 years within which to bring the suit from the death of Ma Ka. It was, therefore, urged that he was barred before his death and that Aung Myat was equally barred as claiming through him.

Mortgage—(Continued).**-1.—(General)—(Continued).**

Held, that it was not clear that Aung Pyo was time barred before he died, as appellant, Ma Shwe Hmon, herself stated that, at her marriage with Maung Sa, Aung Pyo was only 9 years old, and that, therefore, he was a minor when his mother died; and because Ma Shwe Hmon in her written statement said that Aung Pyo died 14 years ago.

It was further argued that plaintiffs' share should be $\frac{1}{3}$ and not $\frac{2}{3}$, land inherited during marriage by husband and wife being classed as *lettetpwa*.

Held, that, throughout the *Dhammathats*, it was recognised that the party by whom it was inherited had a superior right in the inherited property to the other party, and, that, in the case of divorce by mutual consent, for instance, the inheriting party takes a $\frac{2}{3}$ share, because he or she is the party through whom it was obtained (a).

Held, also, that the rule was clearly laid down in para. 226 of the *Attathakega*, according to which the plaintiff was entitled to a $\frac{1}{3}$ share of his grand-mother's inherited property, namely, the 4.72 acres of land in suit.

There were two mortgages effected on the land by Maung Sa after Maung Ka's death, which he was entitled to effect. One was of 2.84 acres to San Dun for Rs. 80, and the other of the remainder of the land for Rs. 50 to Maung Seik, afterwards transferred to Maung Shan Gyi.

Held, that, as regards the mortgage for Rs. 50, plaintiff was not entitled to claim possession until he had paid off the mortgaged debt, but that he was not entitled to possession of $\frac{1}{3}$ on paying off $\frac{1}{3}$ of the debt, as the mortgage affected the whole land and was not divisible.

Held, as regards the other mortgage, that the plaintiff had nothing to pay to any of the present defendants in respect of this land and that as against them he was entitled to the relief prayed for. *Ma Shwe Hmon v. Maung Aung Myat*, 14 Bur. L.R. 117.

MOORE, J.

References:—(a) U. B. R. 1906, 4th Quarter, p. 19, and 19 Bur. L.R. 246, approved.

- (1-a) *Act IV of 1882 (Transfer of Property Act), S. 53—Assignment of invalid mortgage—Rights of assignee as against mortgagor and subsequent mortgages for consideration—Maxim—Qui prior est tempore potior est jure.*

Mortgage—(Continued).**—1.—(General)—(Continued).**

On the 28th October, 1897, one M.A., executed a mortgage of certain property in favour of H.A., which was registered on the 29th of October, 1897. This mortgage was found to be fictitious and without consideration, and to have been made solely for the purpose of defeating the creditors of the mortgagor. On the 15th of August, 1898, the mortgagee transferred his rights under this mortgage to his wife B, in part satisfaction of her dower debt. It was found that this was a *bona fide* transaction and that B obtained the transfer of the mortgage without any knowledge of its fraudulent character and was a transferee in good faith and for consideration. On the 29th of October, 1897, the same property was again mortgaged to one B.P., who accepted the mortgage in ignorance of the existence of the mortgage of the 23rd of October, 1897. This mortgage was registered on the 22nd of March, 1898. B.P. afterwards brought a suit for sale on his mortgage impleading B as a defendant, as well as the mortgagor and the prior mortgagees.

Held, that B was entitled to no relief as against B.P., though as against the mortgagor she was entitled to be paid the amount of the consideration named in the deed of transfer in her favour out of the surplus sale proceeds (if any) of the mortgaged property, and that the proviso to S. 51 of the Transfer of Property Act did not apply to the case as it was intended to safeguard rights already acquired. **Basti Begam v. Banarsi Prasad**, A.W.N. (1908), 116 = 5 A.L.J. 205 = 30 A. 297.

STANLEY, C.J., AND BURKITT, J.

References:—1 Ch. D. 31, D., 15 Beav. 103, 2 Giff. 353; 30 Beav. 54 L.J. 56 Ch. D. 363; 31 Ch. D. 151 and 2 Drew. 73, R.

(2)—Mortgagee accepting deed of further charge from some of the mortgagors, effect on integrity of original mortgage.

Held, that the integrity of the original mortgage was not destroyed by the mortgagee's acceptance of a deed of further charge executed by some only of the original mortgagors secured on their own share of the mortgaged property (a). **Thakur Singh v. Jangli Singh**, 11 O.C. 73.

GRIFFIN, J.O.

References:—(a) 6 O.O. 279, S.C.A. No. 172 of 1897, R.

Mortgage—(Continued).**—1.—(General)—(Continued).**

(3) Mortgage, cancellation of—Permanent lease of mortgaged lands in favour of mortgagee—Mortgagee's failure to perform his part of the contract—Jurisdiction.

The plaintiff executed a mortgage-deed in favour of the defendants Nos. 2 and 4, defendant No. 3 being the son of defendant No. 1, and defendant No. 4 being the son of defendant No. 2, for Rs. 1,000 of which Rs. 875 were to be applied by them towards payment of the prior mortgages. Upon the same day he executed a permanent lease of the mortgaged land in favour of the defendant Nos. 1 and 2 and subsequently received a *labuliat* from them. The defendants did not pay up the prior mortgagees but continued in possession of the lands leased to them. The plaintiff in the case sought for cancellation of the mortgage and the perpetual lease with the *labuliat*. The Courts below found as a fact that the mortgage and the lease were part and parcel of one and the same transaction.

Held, that the case, being one of contract based upon reciprocal promises in which the defendants refused to perform their part of the contract, and that, the contract of lease and that of mortgage being parts of one and the same bargain (a), the plaintiff was entitled to be relieved of both of the deeds. **Saiyed Muhomed Bakar v. Kedar Nath**, 11 O.C. 89.

CHAMIER AND GRIFFIN, J CS.

Reference.—(a) S. C. 280, D.

(4) Son-in-law managing mother-in-law's property—Property ample to meet liabilities—Mortgage to son-in-law—Consideration found to be paid out of estate—Validity of such mortgage—Colourable transaction.

Where a son-in-law was managing his mother-in-law's property, which was ample to meet the liabilities, that, after all, were not of a pressing nature, and the consideration for the mortgage to the son-in-law was found to have been supplied from the income of the estate.

Held, that the mortgage was a colourable transaction entered into by the mother-in-law and son-in-law with a view to saddle the estate with this debt for the benefit of the son-in-law, at the expense of the reversioners. **Tiruvu Goundan v. Kuppa Goundan**, 3 M.L.T. 285.

BENSON AND MILLER, JJ.

Mortgage—(Continued).**——1.—(General)—(Continued).**

(5) *Auction sale in execution of a decree of immoveable property subject to a mortgage—Remedy of the mortgagee—His inability to get the sale set aside—Sale of right, title and interest of the judgment-debtor—Security bond hypothecating property as security for integrity—Its construction—Civ. Pro. Code (Act XIV of 1882), Ss. 278, 282, 283 and 311, etc.*

Held, hypothecating or giving a lien on immoveable property to the extent of any amount as security for integrity is a mortgage of that property for that amount.

Held, also, that where a property subject to a mortgage is sold by public auction in execution of a decree, the mortgagee, whether with or without possession and whether his incumbrance be notified in the proclamation of sale or not, can follow the mortgaged property in the hands of the auction purchaser, whether he came to know about the encumbrance or not at the time of the sale, but he (the mortgagee) has got no cause of action to get the sale set aside.

Held, further, that an executing Court cannot sell what the judgment-debtor himself is unable to alienate privately (a) **Rup Chand v. Seth Kastur Chand**, 7 P.W.R. 1908=62 P.R. 1908.

ROBERTSON AND SHAH DIN, JJ

References—(a) 12 M.L.A. 366 (379); 6 B. 193 (202), 490; 22 B. 624; 29 B. 234, F.

(6) *Plaint—Plan—Suit for recovery of mortgage-money based on a mortgage-deed of house property, no plan necessary—Return of plaint when allowable.*

Held, that, in a suit for the recovery of the mortgage-money based upon a mortgage-deed of house property, no plan of the house is required by law, and that the descriptions of the house given in the mortgage-deed in the case was quite sufficient for the purposes of the suit until the contrary was shown.

Held, also, that returning a plaint before its registration is improper under any circumstances; it is the duty of the Court to register a plaint when presented, even if it is considered defective, and the Court can then pass a formal order returning it for amendment, if necessary. **Sardar Uttam Singh v. Khair Din**, 32 P.W.R. 1908.

KENNEDY, J.

Mortgage—(Continued).**——1.—(General)—(Continued).**

(7) *Mortgage—Incomplete transaction.*

When the part of the mortgage-money remaining unpaid by the mortgagee consisted of a sum which the mortgagor had agreed should be withheld by the mortgagee till mutation of names, and a small sum out of that promised for expenses of the deed, and the mutation of names did not take place at all.—

Held, that the mortgage could not be held as incomplete for default in payment of the mortgage-money. **Mangladha v. Lal Chand and Ghulam**, 60 P.L.R. 1908=26 P.W.R. 1908.

CHATTERJI, J.

(8) *Mortgagor, purchase by, if and when extinguishes his mortgage—Mortgagee purchaser, rights of, to fall back upon mortgage—Mortgage, if and when kept alive—Equity—Lis pendens, doctrine of, when applies.*

Although a security is extinguished upon the actual sale of the mortgaged properties and distribution of the proceeds, yet, a mortgagee, who has purchased at a sale in execution of a decree upon his mortgage, is entitled to rely upon his mortgage as a shield against a subsequent encumbrancer (a)

The question whether a mortgage which has been satisfied is to be construed as extinguished or kept alive for the benefit of the person who makes the payment, is simply a question of intention to be determined with reference to the surrounding circumstances as they exist at the time when the mortgage is discharged. Although, ordinarily, when the interests of the mortgagor and the mortgagee are united in the same person, it is not necessary for him to keep them distinct, equity will keep them distinct, when, from the intention of the party, either express or implied, it is for his benefit that they should be so kept; it depends upon the intention actual or presumed, of the person in whom the interests are united, and this person will be presumed to intend that which is most to his advantage.

Where the mortgagee institutes an action to enforce his security, proceeds to judgment, sells the premises, and purchases them himself, it does not necessarily follow that he intends that his title under the mortgage should merge in the equity of redemption.

A mortgage, however, will not be kept alive in aid of a fraud or wrong; a mortgage substantially satisfied may be kept alive in equity.

Mortgage—(Continued).**1.—(General)—(Continued).**

only when this is requisite to the advancement of justice, and this will never be allowed when the result will be, form the forms of law, to aid in perpetrating a fraud or an injury (b).

A purchaser of a share of an estate under S. 13 of Act XI of 1859 may be affected by the doctrine of *lis pendens*, if he makes his purchase during the pendency of a litigation to enforce a mortgage upon that property (c).

In the case of a mortgage suit, the *lis pendens* continues after the *decree nisi*, and the doctrine of *lis pendens* is applicable to proceedings to realise the mortgage after the decree for sale (d).

But where, as in the present case, the purchase at the revenue sale was effected some time after the mortgage sale had been confirmed, there was no *lis pendens* on the mortgage pending at the date of the revenue sale. **Bhawani Koer v. Mathura Prasad**, 7 C.L.J. 1.

BRETT AND MOOKERJEE, JJ.

References—(a) 30 C. 599, R, 31 C. 863; *Expl.* (b) 11 I.A. 126, 10 C. 1035, 10 I.A. 62; 9 C. 961; 29 I.A. 9, 29 C. 154, (1895) A.C. 11; (1898) A.C. 321; (1865) 34 Beav. 645, R. (c) 26 C. 966, R. (d) 2 C.L.J. 288, R.

(9) *Equity of redemption purchased by a mortgagee from one of the mortgagors, effect of.*

Where a mortgagor died leaving three sons who became equally entitled to the equity of redemption, and one of the sons sold his one-third share in the equity of redemption to the plaintiff mortgagee.

Held, that the plaintiff was entitled in a suit to realise his mortgage debt to give credit only for that which his vendor would have been liable to pay, namely, one-third of the mortgage debt. **Mutty Lal Pal v. Nandu Lal Neogi**, 12 C.W.N. 745=8 C.L.J. 92.

MACLEAN, C.J., AND DOSS, J.

(10) *Mortgage—Joint mortgage—Satisfaction of mortgage debt by sale of part only of the mortgaged property—Suit for contribution by mortgagor whose property has been sold.*

In a suit for contribution amongst co-mortgagors, even if it is a condition precedent to the institution of such a suit that the whole mortgage debt should have been satisfied by sale of mortgaged property, it is not also

Mortgage—(Continued).**1.—(General)—(Continued).**

necessary that it should have been satisfied wholly out of the property of the plaintiff. **Muhammad Yahya v. Rashid-ud-din, A. W.N.** (1908), 289.

BANERJI, J. AND STANLEY, C.J.

References.—12 A. 110 and 26 A. 407, R.

(11) *Construction—Future interest to date fixed for payment.*

Where a decree directed payment of mortgage money and costs of the suit with future interest to the date fixed for payment, *held*, that the decree-holder was entitled to interest until realization (a). **Raja Gokuldas v. Sheth Ghasiram**, 10 Bom. L.R. 144 (F.C.).

LORD ROBERTSON, LORD COLLINS AND SIR ARTHUR WILSON.

References.—(a) 28 I.A. 35 and 34 I.A. 9, F.

(12) *Mortgage decree, whether attachment necessary for execution of—Attachment of property—Application for removing attachment—Civ. Pro. Code, S. 278.*

It is not necessary for a mortgage decree-holder to attach the property which forms the subject of the mortgage.

But even if such decree-holder has taken out an attachment which it is not necessary for him to do, S. 278, C.P.C., is not applicable; and so, no application will lie under that section for the removal of the attachment. **Gobalu v. Po Hla**, 4 L.B.R. 82=14 Bur. L.R. 201.

HARTNOLL, J.

Reference.—4 C. 631, R. and F.

(13) *Suit for sale by prior incumbrancer—Necessary parties—Non-joinder of puisne mortgagee—Transfer of Property Act, 1884, S. 85.*

A prior mortgagee should join the puisne mortgagees as a party to a suit for sale against the mortgagor, if he has notice of their mortgages. He cannot in the execution of a decree against the mortgagor, attach property in the possession of a puisne mortgagee, if the latter has not been made a party to the suit in which the decree sought to be executed against him was passed. The mere fact that the puisne mortgagee has himself brought a suit for a declaration that the property in his possession is not liable to be attached in execution of the decree against the mortgagor will not entitle the prior incumbrancer to have the questions regarding his right decided in that case (d).

Mortgage—(Continued).

—1.—(General)—(Continued).

Although the Transfer of Property Act is not in force in the Punjab, the principles laid down in S. 85 of that Act are the principles which apply to similar cases in the Punjab. *Hukam Chand v. Karam Chand*, 64 P.R. 1908=132 P.W.R. 1908.

ROBERTSON AND KENSINGTON, JJ.

References.—14 M.I.A. 101; 8 B. 168; 13 A. 318; 16 A. 478; 19 A. 379, 19 C. 116; 17 A. 537; 21 M. 222; 13 A. 432; 22 C. 33; 24 C. 644; 5 C.W.N. 423 and 30 C. 755, R.

(14) Rights and position of vendee of a share in joint mortgaged property when it is redeemed in part or whole by his money. See *VENDOR AND VENDEE*, No. 1, 64 P.W.R. 1908.

(15) Possession of joint immoveable property given in execution of money-decree by one co-sharer to decree-holder until payment of decretal amount—Sale of his own interest by another co-sharer to stranger—Suit by vendee to eject decree-holder—Limitation Act, Art. 136. See *LIMITATION*, No. 6, 69 P.W.R. 1908.

(16) Suit to enforce mortgage of occupancy holding, purchased by landlords of non-transferable occupancy holding after its mortgage by tenants to third parties—Whether landlords estopped from setting up non-transferability of holding without their consent. See *OCCUPANCY HOLDING*, No. 1, 12 C.W.N. 72.

(17)—and charge—Difference between—Necessary formality of due execution wanting—Whether converts mortgage into charge. See *COMPROMISE*, No. 2, 7 C.L.J. 492.

(18) Vendor's lien for unpaid purchase-money—Sale deed containing full acknowledgment of purchase-money—Mortgagee taking the mortgage without notice of unpaid purchase-money—Estoppel. See *SALE*, No. 1, 10 Bom.L.R. 403.

(19) Sale of property subject to an unregistered mortgage but whose registration was not compulsory—Purchaser having notice of such mortgage before registration of sale-deed—Mortgage whether binding on purchaser. See *REGISTRATION ACT (III of 1877)*, No. 19, A.W.N. (1908), 99.

(20)—of non-existent property is operative as an executory agreement. See *ACT XI of 1859 (BENARH SALE, BENGA)*, No. 4, 7 C.L.J. 897).

Mortgage—(Continued).

-1—(General)—(Continued).

(21) Whether mortgagor can sue for specific performance of agreement to lend the full sum promised by the mortgagee. See *CIV. PROC. CODE*, No. 175, A.W.N. (1908), 105.

(22) As between a mortgagee and the holders of the equity of redemption, whether mortgagee is bound to distribute his debt rateably upon the mortgaged properties. See *TRANSFER OF PROPERTY ACT*, No. 43, 7 C.L.J. 274.

(23)—of minor's property to secure loan sanctioned by Court. Duty of Court to specify the rate of interest. See *ACT VIII of 1890 (GUARDIAN AND WARD)*, No. 7, A.W.N. (1908), 75.

(24) Sale by mortgagee of property not mortgaged, validity of, where to be questioned—Execution proceedings or separate suit. See *EXECUTION OF DECREE*, No. 5, 7 C.L.J. 270.

(25) Right of Buddhist wife to mortgage her interest in joint property without her husband's consent. See *BUDDHIST LAW (MARRIAGE)*, No. 1, U.B.R. (1907), 4th Quarter, Buddhist Law—Marriage—Joint Property, 1.

(26) Benamidar's right to sue on mortgage assigned to him by mortgagee without consideration—Intention of putting mortgagors into difficulty—Enforceability. See *BENAMI TRANSACTIONS*, No. 3, 12 C.W.N. 409.

(27)—of undivided share of co-sharer in joint estate, whether entitled to priority over charge created on share allotted to him in partition for jewelry money. See *PARTITION*, No. 4, 12 C.W.N. 373.

(28) Government kist, enhancement of—whether mortgagor or mortgagee bound to pay—S. 76, Transfer of Property Act—'Contract to the contrary.' See *CONSTRUCTION (OF DEED)*, No. 4, 18 M.L.J. 31.

(29) Mortgage by Hindu widow without legal necessity—mortgagee spending money on repair of mortgaged property—Suit by reversioner—Right of mortgagee to recover money. See *HINDU LAW (WIDOW)*, No. 7, 9 Bom.L.R. 1181=32 B. 32.

(30)—created by testator on properties given away to testator's mother for her maintenance, decree on—alienation for satisfaction of decree will not prevent the testator's widow from claiming it back on the mother's death—Effect of such a mother's transfer. See *HINDU LAW (ALIENATION)*, No. 2, 17 M.L.J. 622.

Mortgage—(Continued).**—1.—(General)—(Continued).**

(31) Adjustment between mortgagor and mortgagee—Competency of Court finally executing mortgage-decree to give effect to it. See TRANSFER OF PROPERTY ACT, No. 58, 12 C.W.N. 282.

(32)—, property subject to, cannot, under S. 99 of the Transfer of Property Act, be brought to sale in execution of a simple money decree obtained by mortgagee—but otherwise where such sale has been completed and confirmed. See TRANSFER OF PROPERTY ACT, No. 68, A.W.N. (1908), 49.

(33)—integrity of, broken up by sale of part of mortgaged property—Mortgagor could not redeem property so sold, but can redeem unsold portion. See TRANSFER OF PROPERTY ACT, No. 69, A.W.N. (1908), 48.

(34)—, vendee purchasing with notice of prior unregistered—property pre-empted—pre-emptor takes subject to that mortgage, even if existence of mortgage concealed from him. See PRE-EMPTION, No. 6, 5 A.L.J. 112.

(35) Execution of mortgage decree—Sale of *nij jote* lands—judgment-debtor's right to question saleability of jotes. See EXECUTION OF DECREE, No. 1, 7 C.L.J. 101

(36) Portion of mortgaged property acquired for public purposes—Mortgagee's right to compensation awarded. See ACT I OF 1894 (LAND ACQUISITION), No. 18, 17 P.R. 1907.

(37) Mortgage of non-transferable holding—Mortgagee auction-purchaser—Interest of mortgagor—Ejectment of purchaser by landlord—Re-entry—Execution-sale. See ACT VIII OF 1885 (BENGAL TENANCY), No. 16, 7 C.L.J. 72.

(38) Execution of mortgage deed in liquidation of money decree while under arrest—Undue influence. See CONTRACT ACT, No. 4, 51 P.R. 1908.

(39) Portion of property comprised in a mortgage acquired by mortgagor subsequent to decree—Mortgage decree-holder's right against such property—Transfer of Property Act, S. 43.—See TRANSFER OF PROPERTY ACT, No. 8, A.W.N. (1908), 155.

(40) Suit by transferee of mortgage against mortgagor and mortgagee (transferor)—Portion of mortgage debt discharged prior to transfer—Misjoinder of defendants. See CIV. PROC. CODE, No. 45, 18 M.L.J. 238.

Mortgage—(Continued).**—1.—(General)—(Continued).**

(41) Mortgage suit, if a suit with respect to an interest in immoveable property. See LIS PENDENS, No. 1, 8 C.L.J. 153.

(42)—by executor who is also residuary legatee to secure his private debt—Valid against creditors—Legatee's right to impeach—Legacy charged on immoveable property—Lapse of time—Priority—Notice. See EXECUTOR, No. 2, 12 C.W.N. 993 (P.C.).

(43) *Ex parte* decree under S. 90, Transfer of Property Act—Inherent power of Court to set it aside—Personal decree for a large sum not to be made *ex parte*—Decree under S. 90 when can be passed—S. 4, Succession Certificate Act. See TRANSFER OF PROPERTY ACT, No. 61, 35 C. 767.

(44) Sale in execution of a decree—Property purchased subject to a mortgage but not mortgage executed by the judgment-debtor—Purchaser's right. See DECREE, No. 6, 35 C 877.

(45)—suit wherein conditional decree for foreclosure under S. 86, Transfer of Property Act, is passed—Nature of such suit—Whether pending or not—If pending, how long—Appeal. See TRANSFER OF PROPERTY ACT, No. 52, 4 N.L.R. 158.

(46) Default of payment of mortgage-money—Suit by mortgagees for possession of land mortgaged or for money due under mortgage—Art. 135, Sch. II, Act XV of 1877 (Limitation). See LIMITATION ACT (XV of 1877), No. 106, 91 P.R. 1908.

(47) Execution of mortgage deed—Absence of attestation—Signature by the writer of the deed—Signature of Registrar under S. 63-A of the Deccan Agriculturists' Relief Act—Not valid attestations. See TRANSFER OF PROPERTY ACT, No. 30, 10 Bom. L.R. 943.

(48) Suit on mortgage against agriculturist—Jurisdiction. See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), No. 2, 1 S.L.R. 246.

(49) Mortgaged property destroyed under compulsion and security rendered insufficient—Remedy of mortgagee—Verbal agreement of mortgagor to give another mortgage—Effect. See TRANSFER OF PROPERTY ACT, No. 36, 14 Bur. L.R. 159.

(50) Oral agreement adding to the terms of a registered mortgage deed—Admissibility in evidence—Degree of formality of document. See EVIDENCE ACT, No. 23, 4 L.B.R. 240.

Mortgage—(Continued).**—1.—(General)—(Concluded).**

(51) Execution of mortgage bond hypothecating property of joint family belonging to uncle and nephew, validity of. See **HINDU LAW (ALIENATION)**, No. 10/11, 5 A.L.J. 417.

(52) Transfer of Property Act, S. 65—Mortgagees knowing all circumstances of mortgage—Implication of Contract. See **TRANSFER OF PROPERTY ACT**, No. 33, 4 M.L.T. 437.

(53) Suit for sale on mortgage—Compromise by which mortgagee accepted a simple money decree—Second suit for sale barred. See **CIV. PRO. CODE**, No. 20, A.W.N. (1908), 265.

(54) Vendors of property executing deed of indemnity for repayment of purchase money with interest and hypothecating certain property as security—Terms of indemnity held to amount to mortgage within S. 58, Transfer of Property Act. See **TRANSFER OF PROPERTY ACT**, No. 24, 5 A.L.J. 723.

(55) Suit for sale on mortgage—Mortgagee cannot so frame his suit as to draw into controversy the title of a third party who sets up a paramount title in himself. See **TRANSFER OF PROPERTY ACT**, No. 48, A.W.N. (1908), 263.

(56) Mortgage—Construction—Unconditional promise to pay, if implies personal liability. See **TRANSFER OF PROPERTY ACT**, No. 61-a, 13 C.W.N. 138.

(56-a) Mortgage—Construction See **CONSTRUCTION OF DEEDS**.

(57) Mortgagees holding a single decree on two mortgages—Appropriation of sums recovered in execution—Transfer of Property Act, Ss. 96 and 97. See **TRANSFER OF PROPERTY ACT**, No. 62-a, 11 O.C. 277.

(58)—, nature of mortgage decree See **HINDU LAW (WILLS)**, No. 4, 8 C.L.J. 20.

(59) Assignee of a money-decree obtained by the mortgagee, and mortgagee fall under purview of S. 99, Transfer of Property Act. See **TRANSFER OF PROPERTY ACT**, No. 70, 11 O.C. 231.

(60) Suit for partition—Prior mortgagee not made party—Judgment and decree not binding on mortgagee nor can such mortgagee take advantage of it. See **ESTOPPEL**, No. 2, 8 C.L.J. 478.

—2.—(Accounts).

(1)—*Liability of mortgagees in possession for not keeping proper accounts of income—Right of mortgagor: Such a case—Sale—Free consent.*

Mortgage—(Continued).**—2.—(Accounts)—(Concluded).**

Held, that it is a well established legal principle, that, when a mortgagee with possession does not keep a proper and true account of the income of the mortgaged property, the mortgagor is entitled to calculate it on the basis of the highest profits the property is capable of yielding.

Held, also, that, (as in this case), where a vendor is a helpless puppet in the hands of a vendee, and the deed of sale is executed and registered under peculiar circumstances, the sale cannot be treated as a genuine transaction entered into with free consent. **Ram Chand v. Kaim Khan**, 10 P.W.R. 1908.

CHATTERJI AND JOHNSTONE, JJ.

(2) Purchases by prior and puisne mortgagees—Redemption—Accounting. See **MORTGAGE (REDEMPTION)**, No. 18, 8 C.L.J. 173.

—3.—(Conditional sale).

(1) Mortgage without possession by way of conditional sale of ancestral property by childless proprietor—His widow selling that property along with other property and parting with its possession—Suit by reversioner to recover—Limitation Act, Art. 141—Act I of 1900 (Punjab), Art. 1.—See **LIMITATION**, No. 4, 70 P.W.R. 1908.

(2) Suit for possession of property mortgaged by way of conditional sale—Starting point of limitation. See **LIMITATION ACT**, No. 102, 68 P.W.R. 1908.

—4.—(Equitable).

(1) *Mortgage by deposit of title deeds—Whether it is something more than a mere oral agreement or declaration—Duplicate of report to a thugyi—Whether deposit of it can effect a mortgage—Registration Act (No. III of 1877), S. 48.*

A mortgage by deposit of title deeds is something more than a mere oral agreement or declaration, and, therefore, S. 48 of the Registration Act does not apply (a).

As regards one of the pieces of land in suit, the only document appearing from the record to have been deposited with the last respondent, who claimed an equitable mortgage, was a duplicate of a report to the thugyi that, after Ma Tha's death, the land was inherited by Maung Shwe Tu.

Held, that this was not a title deed, and the deposit of it could not effect mortgage. **Paw Wa v. O.A.R. Yallappa Chetty**, 14 Bur. L.R. 311.

IRWIN, O.C., AND ORMOND, J.

Mortgage—(Continued).**—4.—(Equitable)—(Continued).**

References :—(a) 11 C. 158 ; 83 C. 410 ; P.J. L.B. 660, F.

(2) *Deposit of title-deeds with the object of creating a mortgage over the property as security for the loan—Note to this effect on a pro-note for Rs. 10,000—Another pro-note for Rs. 19,000—No further deposit of title-deeds which were with plaintiffs, but not produced—Effect of these transactions*

The title-deeds of a house were deposited with the plaintiffs, when a promissory note for Rs. 10,000 was executed, with the intention of thereby giving plaintiffs a mortgage over the property as security for this loan. There was a note or memorandum to this effect made on this promissory note.

Afterwards the promissory note sued on (for Rs. 19,000) was executed, when there was no further deposit of title-deeds, which were said to be with the plaintiffs, but were not produced. A memo was made on this note that the grants already with the plaintiffs were security.

Held that, as regards the original loan Rs. 10,000, there was a completed transaction of mortgage, evidenced by the delivery of the deeds to plaintiffs, with the obvious intention of giving them a charge thereon, and that the note or memorandum on this promissory note was not the document creating the mortgage, but a mere note or narrative of the transaction, which had been completed and could be proved independently of it.

Held also that, when the promissory note for Rs. 19,000 was executed, the obligation on the promissory note for Rs. 10,000 was extinguished and a fresh obligation was created.

Held further that the only act of the parties, as regards this promissory note, from which any intention could be inferred, was the retention by plaintiffs of the title-deeds, after the promissory note, as security for which they were originally deposited, had been discharged, that, in the absence of any other evidence, the Court would not be justified in holding it proved that the deeds were retained as security for this loan ; that the fact that they were so retained was evidenced only by the memorandum at the foot of the promissory note, which was not a mere narrative of a completed transaction, but was in itself the means, by which the charge, if any, was created.

Mortgage—(Continued).**—4.—(Equitable)—(Concluded).**

Held, therefore, that the memorandum, read with the promissory note, to which it was appended, constituted a complete record of the mortgage set up, that the mortgage of the property for Rs. 19,000, if created, was created by this memorandum and could only be proved by it ; that it was the embodiment of the transaction and that there was no complete mortgage before it was made, and could not be proved for want of registration **L.P.R. Perianen Chetty v Y. Somasundara Iyer**, 14 Bur L.R. 283.

MOORE, J.

(3) *Preference of equitable mortgage over legal mortgage, where latter is not taken with notice of prior equitable charge—Conditions of preference. See TRANSFER OF PROPERTY ACT, No. 8-a, 14 Bur. L R 329*

—5.—(Foreclosure).

(1) *Conditional decree for foreclosure—Mortgage-money made payable by instalment—Order of Court refusing to make decree absolute—Appeal—Civ. Pro. Code, S. 540.*

An order of an additional District Judge, refusing to make absolute a conditional decree for foreclosure, by which the mortgage-money was made payable by instalments, on the ground that all instalments due up to date have been deposited in Court, is a "decree" within the meaning of S. 2, C.P.C.; and an appeal lies against such order under S. 540, Civ. Pro. Code. **Pandurang v. Ram Chandra Venkatesh**, 4 N.L.R. 54.

DRAKE-BROCKMAN, J.C.

References :—3 N.L.R. 55 ; 3 N.L.R. 146 ; 2 N.L.R. 178 ; 16 C.P.L.R. 111, R.

(2) *Purchase of land worth more than Rs. 100—Inability to pay purchase money—Mortgage by purchaser of purchased land as security for price—Suit for foreclosure—Validity and enforceability of mortgage in favour of true owner—Estoppel by false statement where truth known to both parties.*

The defendants bought lands worth more than Rs. 100, and, being unable to pay the purchase-money, mortgaged them to secure payment of the price. They took no deed of conveyance from the vendor, the mortgage-deed reciting that the conveyance was to be executed later on. In a suit by the plaintiff to foreclose the mortgage ;

Mortgage—(Continued).**—S. —(Foreclosure)—(Continued).**

Held, dismissing the suit, that, the defendants having acquired 'no title, and having nothing to mortgage, the mortgage in favour of the true owner was meaningless (a), even where the mortgagor was in physical possession, and that the mortgage was not enforceable at law.

Where both the parties to a transaction know the truth as to matters therein stated, no question of estoppel by a false statement can arise (b). **Sitaram v. Mt. Harku Bai**, 4 N L R 28.

DRAKE-BROCKMAN, A.J.C.

References —(a) 1 R.R. 455, R. (b) 30 C. 539 (546), R.

(3) *Promiss to re-pay mortgage money in instalments—Agreement to treat mortgage as sale in default of paying instalments—Application of Reg XVII of 1806—Meaning of the term "stipulated period" in S. 8 of the regulation.*

Regulation XVII of 1806, does not apply to the case of a mortgage, in which there is no stipulated period for redemption, but there is a condition that the mortgage debt is to be re-paid in annual instalments, and that on default the land should be deemed to have been sold for the balance due at the time of default (a). The term "stipulated period" in S. 8 of the regulation means stipulated period for redemption, i.e., the full term, on the expiry of which the mortgage money is payable, although the mortgagee may, on a default being made, sue to foreclose at an earlier period under the terms of the deed. A foreclosure notice issued before the expiry of the stipulated period is premature and useless (b). **Har Gopal v. Bhagwan Sahai**, 70 P.R. 1907 = 38 P.L.R. 1908.

CHATTERJI AND JOHNSTONE, JJ.

References —(a) 50 P.R. 1906, F. (b) 28 C. 228 (P.C.), F.

(4) *Suit for foreclosure—Subject-matter, value of—Jurisdiction.*

Held, that a suit for foreclosure of a mortgage of land is a suit for land (a).

Held, further, that the value of the subject-matter of such a suit cannot exceed value of the mortgagor's interest which will pass to the plaintiff mortgagee on foreclosure (b). **Girdhari Lal v. Sheo Nandan Lal**, 11 O.C. 154.

CHAMBER AND EVANS, JJ.

References —(a) 9 B.L.R. 171; 27 M. 157 and 32 B. 701, R. (b) 5 A. 436 and S.C. 267, R.

Mortgage—(Continued).**—S.—(Foreclosure)—(Continued).**

(5) *Mortgages in possession—Application for foreclosure of mortgage—Limitation—Limitation Act, Arts. 135, 147 and 178—Beng. Reg. XVII of 1806, S. 8.*

There is no authority for holding that a mortgagee in possession is bound to apply for foreclosure within 12 years from the date of the default. He can take out foreclosure proceedings at any time during the subsistence of his mortgage. **Nagar v. Saudagar**, 57 P.R. 1908 = 115 P.W.R. 1908.

RATTIGAN AND LAL CHAND, JJ.

References —121 P.R. 1894; 85 P.R. 1899; 108 P.R. 1901 (F.B.), 65 P.R. 1906 and 4 M. 172, R.

(6) *Adverse possession—Mortgagor and mortgagee—Assertion of proprietary right by mortgagee after invalid foreclosure proceedings.*

Held, that a mortgagee, who has taken fruitless foreclosure proceedings, cannot, by asserting himself to be the proprietor and getting mutation in Revenue records in his favour, start a possession adverse to the mortgagor. **Indar v. Assa Singh**, 90 P.L.R. 1908 = 65 P.R. 1908 = 113 P.W.R. 1908

CLARK, C.J., AND REID, J

References —(a) 14 M. 38; 14 B. 279; 16 B. 134; 32 C. 296; 49 P.R. 1882, R.

(7) *Appeal arising out of a suit for foreclosure—Court fee is payable on subject-matter in dispute in appeal, not on the principal money secured by the mortgage. See COURT FEES ACT, No. 9, 5 A L J. 531*

(8)—, decree for—mortgagor paying only part of the sum decreed—Mortgagee applying for order absolute to foreclose mortgaged property in lieu of balance unpaid—Right of mortgagor to claim return of sums paid before decree is made absolute. See TRANSFER OF PROPERTY ACT, No. 53, 10 O.C. 354.

(9) Mortgagor paying only part of sum under a foreclosure decree, not entitled to claim return of sums, paid by him, before passing of order absolute to foreclose mortgaged property, in lieu of balance unpaid by him. See TRANSFER OF PROPERTY ACT, No. 53, 10 O.C. 354.

(10)—, first mortgagee entitled to redeem second mortgage, created during pendency of contentious proceeding between himself and

Mortgage—(Continued).**—5.—(Foreclosure)—(Concluded).**

mortgagor—Such second mortgagee not entitled to redeem first mortgage. See **MORTGAGE (REDEMPTION)**, No. 5, 10 O.C. 356.

—6.—(Redemption).

(1) *Hindu Law—Mitakshara—Joint family—Mortgage by manager—Sale by mortgagee of mortgaged property in execution of money decree prohibited—Transfer of Property Act (IV of 1882), S. 99—Mortgagee's possession no adverse—Minor not bound by such sale—Modes of extinguishing right of redemption—Effect of mortgagor's acquiescence or silence.*

S. 99 of the Transfer of Property Act prohibits a sale of mortgaged property held in contravention of the provisions of that section (a).

In a joint Hindu family governed by the Mitakshara, a son is not deprived of his equity of redemption by virtue of a sale prohibited by law (b).

A suit for redemption is not barred merely by reason of silence or acquiescence on the part of mortgagor unless there is a release of the equity of redemption (c). The only modes in which a mortgagee can extinguish the right of redemption are either by getting the mortgagor to execute a release of the equity of redemption in his favour, or by a proper suit under the Transfer of Property Act. A mortgagee by erroneously representing himself as owner of the mortgaged premises cannot make his possession adverse to the true owners. *Jhabba Lal v. Chhajju Mal*, 4 A.L.J. 787 = A.W.N. (1908), 1 = 3 M.L.T. 132.

DILLON, J.

References.—(a) 21 C. 37; 30 C. 463; 17 A. 522, F. (b) 22 M. 372, F; 22 B. 624, Appl; 32 C. 296, F.

(2) *Suit for redemption—Practice—Plaintiff suing as also heir—Death of plaintiff—Abatement of suit.*

One P, sister of the respondent D, sued the appellant for redemption of mortgage, executed by P's father in favour of the appellant, on the ground that she, as an unmarried daughter, had obtained the sole right to the property of her father to the exclusion of her married sister, to whom along with herself, when a minor, the mortgaged property had, in a previous litigation

Mortgage—(Continued).**—6.—(Redemption)—(Continued).**

between the parties interested in the mortgage, been surrendered by the order of the Court, which had held the mortgage debt to have been satisfied. In the present suit P was made a *pro forma* defendant.

P having died during the pendency of the suit, D applied to have her name removed from the array of defendants and substituted as plaintiff.

Held, that the right claimed by P being a personal right and adverse to that of her sister D, the suit abated after P's death, and D could not get her name substituted as plaintiff and continue the suit **Balak Puri v. Musammat Durga**, 4 A.L.J. 783 = A.W.N. (1908), 6 = 3 M.L.T. 181 = 30 A. 49.

STANLEY, C.J., AND BURKITT, J.

(3) *Practice—Transfer of Judge—Propriety of re-opening questions already decided—Mortgage—redemption—Decree, interpretation of—Accounting.*

When a Judge gives his decision on some of the questions involved in a case leaving the remaining questions to be determined at a subsequent date, the Judge who succeeds him in the meanwhile does not act properly, though not illegally, in passing judgment contrary to the decision given by his predecessor, especially in a case when judgment is open to appeal. It is only when there is an obvious and patent error in the earlier decision that a successor should re-open a question in an appealable case.

A mortgagee obtained a decree that he was entitled to recover the mortgage-money from the mortgagor and other property of the mortgagor and the latter was also made personally liable for a part of the sum decreed. The mortgaged property was in possession of the mortgagee under the terms of the mortgage for profits to be realized in lieu of interest. The mortgagor brought a suit for redemption and claimed deduction for the profits realized by the mortgagee from the amount adjudged against him by the decree.

Held, that the claim was valid under the terms of the decree.

Under the peculiar circumstances of the case it was ordered that on the mortgagor's failure to redeem within the fixed period he would not be able to redeem in execution of the decree.

Mortgage—(Continued).

——6.—(Redemption)—(Continued).

passed in the case. **Chuni Lal v. Mian Ghulam Farid Khan**, 41 P.L.R. 1903=42 P.W.R. 1908.

ROBERTSON AND CHATTERJI, JJ.

References —124 P.R. 1894, R.

(4) *Suit for redemption—Mortgage deed—Construction of the same—Compound interest—Maintenance costs—Enhanced Government revenue—Arrears of rent—The same statute barred or otherwise—Previous suit for possession—Account filed therein—Estoppel—Recovery of costs thereof—Practice—Point not taken before either of the lower Courts—Whether the same was open before their Lordships*

On the true construction of cl. (4) of the mortgage deed, which provided "that in case of default in payment by me (mortgagor) of instalments of interest at the time herein appointed, the mortgagee shall have immediately on such default, power either to recover the whole of his principal, interest, and, *sud* **Mazid Munafa Maskura**, further interest on the said interest according to the rate herein fixed ... or the said mortgagee shall, in default of payment of the instalment or instalments of interest aforesaid, take possession of the mortgaged property," their Lordships agreed with the lower appellate Court that the mortgagor was not liable for compound interest, since the mortgagee entered into possession of the mortgaged property.

Their Lordships upheld the concurrent finding of both the lower Courts, that, under the mortgage deed in this case, the mortgagee was entitled to get from the mortgagor, over and above the usufruct of the mortgaged property, the amount paid by him on account of maintenance and enhanced Government revenue.

Under cl. (10) of the mortgage deed in question, which provided that "whenever after the term of the mortgage or during the said term I (mortgagor) pay to the mortgagee in any *khal* has (fallow season), i.e., in the month of Jeth, the whole of the mortgage money, and the whole of the interest together with Government revenue, arrears of rent and *takani* advances, due from tenants, and other expenses incurred under the terms of this document, without raising any objection of law, such as limitation, etc., I, the mortgagor, shall have power to redeem the mortgaged property," their Lordships

Mortgage—(Continued).

——6.—(Redemption)—(Continued).

agreed with the lower Courts that the mortgagee was entitled against the mortgagor to arrears of rent due from tenants, even when such arrears were statute-barred as against the tenants.

The mortgagee brought a suit against the mortgagor, alleging that at the date of the suit there was due to him a sum of Rs. 33,087-18-8 and, praying for a decree for possession of the property, or, in the alternative, for recovery of that sum with further interest. A Commissioner appointed to make up the accounts reported that Rs. 33,087-9-8 were due to the mortgagee at the date of the suit. The Court in giving judgment, held, that there was no necessity for passing an order as to the amount due under the mortgage bond saying that the account was correct, and then proceeded to give the mortgagee a decree for possession. The amount alleged to be due by the mortgagee and found due by the Commissioner was arrived at by calculating compound interest on unpaid instalments of interest. It was contended by the mortgagee, in a subsequent suit brought against him by the mortgagor for redemption of the mortgaged property, that the decree in the previous suit must be accepted as settling the amount due to the mortgagee on the date of that suit.

Held, by their Lordships, who adopted the conclusion of the Lower Appellate Court, that nothing had occurred in the previous suit to raise an estoppel against the mortgagor, and, therefore, he might, in the subsequent suit, show, if he could, that, under the terms of the deed compound interest was not payable.

The mortgagee was not entitled to recover the costs of the previous suit in the absence of any provision in that behalf, in the mortgage deed.

A point not taken by a party before either of the Lower Court was not open to it, at the time of the hearing of the appeal before their Lordships. **Muhammad Naseem v. Mirza Muhammad Abbas Ali Khan**, 10 Bom. L.R. 126 (P.C.)

LORD ROBERTSON, LORD COLLINS AND SIR ARTHUR WILSON.

(5) *Right of prior mortgagee to redeem a puisne mortgage—Foreclosure in favour of a prior mortgagee, effect of, when puisne mortgagee no party—Mortgagee, puisne, right of, to redeem a prior mortgage when property already foreclosed by the prior mortgagee.*

Mortgage—(Continued).**6.—(Redemption)—(Continued).**

A second mortgage, made during the pendency of a contentious proceeding between a mortgagor and a prior mortgagee, cannot be allowed to affect the right of foreclosure, conferred upon the prior mortgagee, where the mortgagor failed to redeem the property.

Where a property had been foreclosed by the first mortgagee in a suit to which the second mortgagee was not a party. *Held*, that the first mortgagee was entitled to redeem the second mortgage (a). The holder of the second mortgage cannot however redeem the first mortgage. **Kedar Nath v. Sayyad Hafiz Ali**, 10 O C. 356.

CHAMIER and GRIFFIN, J. CS.

Reference.—(a) 28 B. 153, F.

(6)—*Construction of the deed—Provision to make over land on failure to redeem at a certain time, effect of—Right of redemption—Transfer of Property Act, S. 60, applicability of, to Burma.*

A mortgage document ran as follows:—

On the 11th Tazaungmon Lasok, 1261, U.E. and his daughter, Mi Kywe said to Ko Yunut and his wife, Ma Paw, "We wish to mortgage our land, called *Maubin*, yielding 600 baskets of paddy, situated on the north of Ywagauk and bounded as shown below, for Rs. 430. We will redeem it in *Tabaung*, 1262, by payment of an extra sum of Rs. 70, i.e., Rs. 500 in all. If while the land is in Ko Yunut's possession there be any interference on the part of Government or others, we will bear the responsibility thereof with costs. If, on the arrival of the date (specified), we fail to redeem, we will make over outright to Ko Yunut and wife, Ma Paw, the land within the (aforesaid) boundaries for Rs. 430, the money advanced." Whereupon Ko Yunut and wife, Ma Paw, paid over Rs. 430 and accepted the *maubin* land in mortgage, etc.

The mortgagors sued for redemption after the expiry of the stipulated time.

Held (1) that, in Burma, the Courts have nothing to do with the ancient law of India in relation to mortgages, that they are bound by equity, justice and good conscience, and that the rules contained in the Transfer of Property Act have been commended to the Courts as rules of equity, justice and good conscience (a);

(2) that the equitable principle contained in S. 60, Transfer of Property Act is in favour of the conservation of the right to redeem (b);

Mortgage—(Continued).**6.—(Redemption)—(Continued).**

(3) that the intention to extinguish that right should be clearly expressed, or should be deducible unmistakably from the words of the deed, or the conduct of the parties (c);

(4) and that the contract in the case was not intended to execute itself, but that a further transaction was necessary before the land could become the property of the mortgagees. **Nga Kyaw v. Nga Yu Nut**, U.B.R. (1907), Third Quarter, Mortgage, 1.

SHAW, J. C.

References.—(a) 26 C. 1, F; U.B.R. (1897—1901), 502 and U.B.R. (1897—1901), II, 509, R. (b) U.B.R. (1897—1901), II, 509, F. (c) U.B.R. (1897—1901), II, 509, F.

(7) *Who is entitled to redeem—Person having an interest in mortgage property, repudiating the mortgage as unauthorised and a not binding on him, whether entitled to redeem.*

Redemption is primarily an incident of the contract of mortgage, and, as such, the right to it can only exist in such persons as are reached and bound by the contract. No person who is not affected by the contract of mortgage can sue to redeem such mortgage. Thus, where a person having an interest in the mortgaged property repudiates the mortgage as unauthorised and as not binding on him such a person has no right to redeem. If he has any interest in the property covered by the mortgage, his suit would be one, not to enforce, but to avoid the contract. **Ghanya v. Ukund Rao**, 4 N.L.R. 9.

STANFORD, SECOND AD. J. C.

(8) *Suit for redemption—Valuation of suit for purposes of further appeal—Revision—Punjab Courts Act, 1884, Ss. 40 (1) (a) (ii) and 70 (1) (b)—Mortgage—Foreclosure—Defective notice—Reg. XVII of 1806—Waiver to take advantage of legal defects.*

Where, in a suit for possession, by redemption, of half of a building, which half was worth more than Rs. 2,500, but the mortgage burden on which was only Rs. 1,500, the claim was for redemption on payment of Rs. 1,000, and the decree, appealed against, was for redemption on payment of Rs. 1,500, the value of the suit was held to be Rs. 1,500, i.e., the sum made payable by the decree appealed against, and not the value of the property bearing the mortgage.

Mortgage—(Continued).**—6.—(Redemption)—(Continued).**

burden, and the case was held to be one to be argued on the basis of cl. (b) of S. 70 (1) of the Punjab Courts Act and not under S. 40 (1) (a) (ii).

Where a mortgagor appeared, on receipt of a defective notice of foreclosure issued under the provisions of Reg. XVII of 1806, to contest the notices and offered to pay to the proper persons, held that the mere offer to pay to the persons entitled did not amount to a waiver of his right to take advantage of the legal defects in the foreclosure procedure in a subsequent suit for the redemption of the mortgage (a).

Quære.—Whether cross objections, under S. 561, C.P.C., can be entertained by an appellate Court in a case where no appeal lies. **Balwant Singh v. Ram Das**, 23 P.R. 1908=41 P.W.R. 1903=141 P.L.R. 1908.

CHATTERJI AND JOHNSTONE, JJ.

Reference.—(a) 21 P.R. 1903, R.

(9) *Code of Civil Procedure (Act XIV of 1882), S. 13—Suit for redemption decreed—Second suit for surplus profits recoverable by mortgagee during mortgage not maintainable—Effect of Art. 105, Limitation Act (XV of 1857).*

Art. 105 of the Limitation Act must not be construed so as to conflict with the provisions of S. 43 of the Code of Civil Procedure, and must be deemed to refer to cases in which the mortgagor has got possession of the mortgaged property otherwise than by a suit for redemption (a). Where a mortgagor brings a suit and obtains a decree for redemption, he cannot maintain a second suit for recovery of surplus collections made by the mortgagee, during the period of the mortgage, S. 43 of the Code of Civil Procedure being a bar to the maintenance of that suit (b).

Per Karamat Husain, J.—The right to claim the surplus profits is synchronous with the right to claim possession of the mortgaged property, and to hold that the cause of action for claiming excess collections accrues when the mortgage-debt has been satisfied, is inconsistent with the principles on which the law of redemption is based (b). **Ram Din v. Bhup Singh**, 5 A.L.J. 192=A.W.N. (1908), 96=30 A. 225.

AKKMAN AND KARAMAT HUSAIN, JJ.

Mortgage—(Continued).**—8.—(Redemption)—(Continued).**

References.—(a) 7 W.R. 564 and 84 C. 223, R. (b) 26 B. 661; 31 B. 527; 84 C. 228; 4 A.L.J. 763; 6 B.H.C.R. 97 (99); 8 C. 593; 19 C. 615, R.

(10) *Right of a prior mortgagee to compel puisne mortgagee to redeem the whole—Redemption of a portion of the mortgaged property where the mortgagee refuses to allow redemption of the whole—Estoppel by defence raised in the previous case.*

Under a mortgage of September, 1879, and a subsequent agreement, S became the mortgagee in possession, for a term of 12 years, of a 4 annas share of K and an 8 annas share of B in two villages. In December, 1889, K mortgaged his 4 annas share for 30 years to the plaintiff, who redeemed the mortgage of 1879 and took possession of both shares. In 1897, B mortgaged his 8 annas share to the defendant, who then sued the plaintiff for redemption of that share on the payment of the amount due on it under the mortgage of 1879. The plaintiff insisted on the defendant redeeming the whole share of 12 annas, and the defendant's suit was dismissed. In 1899, the defendant brought another suit for redemption of both shares, obtained a decree and took possession. In 1901, plaintiff sued for redemption of the 4 annas share of K only, on payment of the amount due on it under the mortgage of 1879, but offered to redeem the share of B also. The defendant did not accept the offer.

Held, that the plaintiff was entitled to redeem K's 4 annas share. **Jawahir Singh v. Baldeo Bakhsh Singh**, 10 O.C. 193 (P.C.)=6 C.L.J. 672=12 C.W.N. 515.

LORD ASHBORNE, LORD MACNAGHTEN,
LORD ATKINSON AND SIR ARTHUR WILSON.

(11) *Birth rights, enjoyment of, by one heir of mortgagee adversely to other heirs—Limitation.*

This was a suit for redemption by the representative of the mortgagor, and the question for decision was, which of the parties claiming to represent the original mortgagee was entitled to the mortgage-money. *Held*, that the right of a Hindu to birth was in the nature of immoveable property, and that its enjoyment by one heir of mortgagee adversely, in his own right, for more than 20 years, extinguished the title of rival claimants to the

Mortgage—(Continued).**—8.—(Redemption)—(Continued).**

subject-matter of the mortgage, and debarred them from claiming any share of the sum payable on redemption. *Mohan Lal v. Janki*, 34 P.R. 1908=96 P.W.R. 1908=163 P.L.R. 1908.

REID, J.

- (12) *Onerous condition—Condition as to mortgage being not redeemable for 60 years enforced.*

The mortgagor specifically agreed with the mortgagee that he should not be entitled to redeem until after the expiry of 60 years. The purchaser of the mortgaged property from the mortgagor sued for redemption and contended that the condition as to redemption was so inequitable and onerous that relief from it should be given on equitable grounds, and it should be struck out.

Held, that the contention was not valid and redemption could not be allowed to the plaintiff before the expiry of the stipulated period. *Ralla v. Amin Chand*, 126 P.L.R. 1908.

ROBERTSON AND KENSINGTON, JJ.

- (13) *Mortgage—Rights and liabilities of stranger redeeming mortgaged property—Subsequent suit by lawful heir of mortgagor—Amount spent by the stranger on funeral ceremonies and liquidation of debts of the mortgagor—Separate suit—Limitation Act XV of 1877, Art. 118 of 2nd schedule.*

Held, that, a person, who, believing himself to be a representative of a mortgagor, redeems the mortgaged property, becomes virtually an assignee of the mortgage; and in a redemption suit subsequently brought by the *de jure* heir of the mortgagor, he cannot successfully plead that he has lien on the said property for the amounts spent by him on funeral ceremonies of the mortgagor and his wife and liquidation of their debts, and that he can retain possession of the property redeemed until those amounts are paid to him. But he can maintain a separate suit for recovering the money thus spent by him from estate of the mortgagor (a). *Mehr Singh v. Jhanda Singh*, 81 P.W.R. 1908.

KENSINGTON AND LAL CHAND, JJ.

References:—(a) P.R.C. No. 124 of 1883, F; P.R.C. 179 of 1888—25 A. 66—15 C. 692; 21 C. 142 and 8 W.R. 115, D.

Mortgage—(Continued).**—8.—(Redemption)—(Continued).**

Note.—Question of adoption and article 118 of Act XV of 1877 was also discussed in this case.

- (14) *Recital by joint mortgagees—Acknowledgment—Liability—Limitation.*

Certain items of properties were held on mortgage under one deed jointly by the defendant's father and his nephew, from plaintiff's ancestor. Subsequently the nephew executed a deed in favour of the first defendant's father signed by them only, containing a recital that the share allotted as the due proportion of the consideration amount chargeable on some of the items of the mortgaged property was Rs. 400 and that their share of the debt had been released in favour of the first defendant's father.

A suit was brought by the plaintiff for redemption of the whole of the mortgaged properties. The defence was that the suit was barred by limitation. It was contended on behalf of plaintiff that the recital in the release deed was an acknowledgment of liability which saved limitation. *Held*, that the recital was an acknowledgment of the mortgage so far as those properties are concerned, but that no further acknowledgment could be implied that the remaining portion of the consideration mentioned in the document executed by the plaintiff's ancestor stood charged on the remaining items of properties mentioned in that document.

An existing liability cannot be read into a document by proof alone or even by admission subsequently made by a party to the suit in which the acknowledgment is relied upon as saving the bar of limitation.

An acknowledgment to bind a party to a suit must be signed by the party or some person through whom he derives title or liability. *Narayanan Parameswaram v. Narasimha Aiyar Sankara Narayana Aiyer*, 23 T.L.R. 36.

SADASIVA AIYER, C.J. AND HUNT, J.

References:—26 M. 37; 19 T.L.R. 67, R.

- (15) *Redemption by purchaser—Sale held invalid—Recovery of money paid for redemption.*

The purchaser in possession, who pays off an incumbrance in the estate which he has purchased, can recover the amount paid by him.

Mortgage—(Continued).

—6.—(Redemption)—(Continued).

Chama Swami v. Padala Anandu, 3 M.L.T. 895=18 M.L.J. 806.

WALLIS AND MUNRO, JJ.

References:—10 C. 1095; 21 M. 143, F; 21 C. 142; 5 C.L.J. 611; (1892) A. C. 166, F.

(16) *Construction of deed—Redemption before the expiry of the fixed period.*

Held, on the construction of the deed in the case, that the parties to it clearly intended that the relation between them should be that of mortgagor and mortgagee and that plaintiff was entitled to redeem the mortgage even before the expiration of the fixed term (a). **Mahamad Muse v. Bagas Amanji Umar**, 10 Bom. L.R. 742=32 B. 569.

BATCHELOR AND CHAUBAL, JJ.

References:—(a) 26 B. 252 (253), 3 Bom. L.R. 778, F.

(17) *Mortgage with possession—Second mortgage under an unregistered deed—Delivery of property—Stipulation postponing redemption till payment of the additional advance, not binding on purchaser—Registration Act, S. 49—Transfer of Property Act, S. 59, cl. (2).*

Property subject to a possessory mortgage was again mortgaged by an unregistered deed to secure a fresh advance. The second mortgage provided that the property should not be redeemed except upon payment of the additional advance.

Held that, there being nothing in the transaction which could be regarded as delivery of the property, the deed should have been registered.

Held further, that a purchaser of the property subject to the mortgage was not bound by the stipulation postponing redemption till payment of the additional advance.

Held also, that the stipulation could not be enforced because the subsequent deed being inadmissible in evidence under S. 49 of the Registration Act could not be used to fetter the equity of redemption (a). **Sada Sheo v. Mahabir Prasad**, 11 O.C. 248.

CHAMIER, J.C.

References.—(a) 4 A. 85; 9 B. 233; 18 M. 368; 12 B. 231, R.

(18) *Redemption, right of—Mortgages—Purchases by prior and puisne mortgagees—Accounting—Tenants settled on the land by prior mortgage, right of.*

Mortgage—(Continued).

—6.—(Redemption)—(Continued).

Where the prior mortgagee purchased the property mortgaged to him in a suit in which the puisne mortgagee was not made a party and the latter also purchased the same property subsequently in a suit in which the prior mortgagee was not made a party,

Held, that each party would be entitled to redeem the other; but the preferable right to redeem was with the puisne mortgagee.

The puisne mortgagee is bound to pay the mortgage money with interest at the rate specified in the mortgage to the prior mortgagee and any amount paid by the prior mortgagee in possession for the protection of the property or for redeeming any prior mortgage with interest as also the costs of the suit and appeal as in an ordinary redemption suit. An account was to be taken of the amounts realised from the property by the prior mortgagee as mortgagee in possession from the date of the possession taken by him (prior mortgagee). If on taking accounts any balance be found in favour of the puisne mortgagee, the prior mortgagee will be bound to pay the said amount to him; but if otherwise, then the usual decree in redemption suit will be passed.

The tenants settled by the prior mortgagee on the land are entitled to remain on the land until it be found in any subsequent suit or suits that they are liable to ejectment under the Bengal Tenancy Act or any other Act that may be in force. **Kedar Prosanna Labiri v. Girindra Prosad Sukul**, 8 C.L.J. 173..

MITRA AND BELL, JJ.

(19) *Right to redeem whether res judicata—Judgment containing secondary evidence of mortgage put in evidence by plaintiffs for purposes of res judicata—Defendant's duty to prove mortgage—Limitation Act, Art. 134.*

The mortgagee's claim to redemption will not be *res judicata* in a subsequent suit, by reason of the decree in an earlier suit, where the parties were not the same and the plaintiff in the subsequent suit did not claim under the plaintiff in the earlier suit.

Where, for the purposes of *res judicata*, the plaintiffs put in evidence a judgment containing secondary evidence of a mortgage, this would not absolve the defendants from the duty of proving their mortgage by original evidence or of making out a case for the admission of secondary evidence.

Mortgage—(Continued).**6.—(Redemption)—(Continued).**

Where the defendant's claim under Art. 134, Limitation Act, did not ripen, and the plaintiff was not bound to redeem at the time of the former suit, the defendant is not debarred from subsequently putting forward his claim under that article.

The point that a mortgage has not been formally proved, if not taken in the lower Courts, cannot be taken in second appeal. **Krishna Patter v. Arappath Veetil Maivappa Muthan**, 4 M.L.T. 73.

WHITE, C.J. AND MILLER, J.

(20) *Old mortgage—Burden of proof—Secondary evidence of terms of a mortgage deed—Admission.*

In a suit for redemption of a mortgage of 1846, held, with reference to the provisions of S. 6 of Act I of 1869, that the burden is on the plaintiff to give at least *prima facie* proof that the mortgage is redeemable (a)

Held further, that secondary evidence of the terms of the mortgage deed, if admissible, must be of the kinds specified in S. 69 of the Evidence Act.

Held also, that no admission by the mortgagee can operate to make a mortgage redeemable which by law was irredeemable at the time when the admission was made. **Kayasth Scholarship Trust, Allahabad v. Shankar Din**, 11 O.C. 285 (B.).

EVANS AND PIGOTT, A.J. CH.

Reference :—(a) 3 I.A. 85, R.

(21) *Mortgage—Redemption—Meaning of "Ta miyad das sal tak girau rahn ba kabza rakha hai"—Right of mortgagor to redeem—Meaning of the term "foreclosure" in the Punjab.*

Held, that, in the absence of any words clearly signifying that the mortgagor is not to redeem for a certain period he can redeem it at any time; and that any phrase in the deed simply reciting that the mortgage is for a certain period should be regarded as a clause inserted for the benefit of the mortgagor and intended to protect him from foreclosure for a period and not to hinder him from redeeming within that period; and that the words "*ta miyad das sal tak girau rahn ba kabza rakha hai*," mean in the absence of any further words showing

Mortgage—(Continued).**6.—(Redemption)—(Continued).**

for whose benefit the period of ten years was fixed, that the mortgagee is not to foreclose till the end of that period (a).

Obiter. Per Kensington, J.—That in the case of mortgages in the Punjab, other than those containing a conditional clause, the term *foreclosure* denotes merely the right of a mortgagee to sue for his money and does not bear the technical meaning given to the term in other Provinces where the Transfer of Property Act IV of 1882 is in force **Firoze-ud-din v. Firoze-ud-din**, 137 P.W.R. 1908.

KENSINGTON AND CHEVIS, JJ.

References :—(a) C. 201 of 1889, 10 A 602; 2 M. 314, F, 40 P.L.R. 1903, R and D; 5 B. 22; 20 B 677, Diss.

(22) *Mortgage—Suit for redemption—Possession on default of payment of interest, stipulation for—Interest—Construction of mortgage deed*

This was a suit for redemption of a mortgage deed, the material portions of which were as follows—

"That I will pay interest... year after year, and, should there be a default in payment of interest for any year, the mortgagee can at once take possession of the mortgaged property. That whatever profits may be left after payment of the Government Revenue, etc., will be appropriated by the mortgagee in lieu of the interest. That whenever—I pay off—the principal sum and the remaining interest, the mortgaged property will be redeemed."

The mortgagee did not take possession until several years after the first default.

Held, that the mortgagee was entitled to get interest for the period he was out of possession (a). **Ram Din v. Ram Prasad**, 11 O.C. 323

EVANS, A.J.C.

References :—(a) 10 O.C. 29 and 19 A. 39, R; 17 B 425 and 9 O.C. 144, D.

(22-a) *Prior mortgagee not making puisne mortgagee party—Subsequent suit by the latter—Conditions of redemption—Interest at the contract rate.*

In a suit by a prior mortgagee, one of the *puisne* mortgagees was not made a party, and the former purchased the property at the sale held under the decree obtained by him in his suit. The *puisne* mortgagee sued, subsequently to redeem the prior mortgages, and, in that suit,

Mortgage—(Continued).

—5.—(Redemption)—(Continued).

a question as to the conditions of the redemption arose. *Held*, that the *pursus* mortgagee not being a party to the previous suit, it ought not to affect either his rights or his liabilities. He could not use the previous decree so as to cut down the prior mortgagee's interest, and at the same time deprive him of the whole advantage of it. The prior mortgagee should, therefore, be entitled to whatever interest his contract entitled him to (a).

The equitable considerations which appear to have prevailed with the learned Judges in *Gangaias Bhattar v. Jogendra Nath Miller* (b) seem to be applicable only to a case in which the prior mortgagee has notice of the subsequent encumbrance, and the subsequent encumbrancer has no notice of the prior mortgage. In such a case it may be just to penalize the prior mortgagee for his disregard of the provisions of S 85, Transfer of Property Act. *Thennappa Chettiar v. Marimuthu Nadan*, 18 M.L.J. 344—31 M. 258 = 4 M.L.T. 293.

WHITE, C.J., AND MILLER, J.

References :—(a) 18 O. 164 (P.C.), F. (b) 11 O. W.N. 403, D.

(23) *Mortgage by some members only of Hindu joint family—Mitakshara Law of the Benares School—Foreclosure decree against mortgagors only—Subsequent suit for redemption by other members—The rights of the mortgagors and mortgagees in such suit—Fresh account to be taken—Irrespective of account in the foreclosure decree—Rules for the calculation of interest.*

Certain immoveable property, belonging to the joint estate of a Hindu family governed by the Mitakshara Law of the Benares School, was mortgaged by A, B and C, three of the members of the above family. To the foreclosure suit brought by the mortgagee against A, B and C, the sons and grandsons of the mortgagors, A, B and C, were not made parties. After the foreclosure decree was made absolute, when the mortgagee sought possession, the co-parceners, who had not been made parties to the former suit, instituted a suit for redemption. The lower Court, while decreeing redemption, held that the price of redemption should be fixed at what was found payable in the former suit. *Held* :

If it be taken as a general proposition that the price of redemption, to persons, who should have been, but were not, made parties to the

Mortgage—(Continued).

—6.—(Redemption)—(Continued).

foreclosure decree, is to be limited to the sum fixed by that decree, regardless of the time which may have passed since the decree was made, then the rule laid down would be at variance with the principle enunciated in 15 C.P. L.R. 26.

It is difficult to see how a foreclosure-decree could be regarded as non-existent with respect to the redemption rights of the plaintiffs, and yet be used against the correlative rights of the defendants. No undue advantage would be given to the defendants, if a fresh mortgage account, unconnected with the account which formed the basis of the foreclosure-decree, is now made the foundation of the redemption-decree.

The mortgagees are not under any legal obligation to create an opportunity for redemption, by the mortgagors or any person claiming under them, at any particular time. Their obligation is limited to this—that whenever they might claim to foreclose against any such person, they must give him a period to be fixed by the Court, within which to exercise his right of redemption.

The mortgage-debt remains a debt which the plaintiffs are bound to pay according to the terms of the deed, and they are therefore liable for daily increasing interest while they choose to leave the debt unpaid. This increase of interest is not due to any fault of the defendants. The plaintiffs are not bound to await a foreclosure-suit by the defendants before they seek redemption. They could have paid and redeemed on any day after the due date fixed by the bond.

A decree, which is a dead letter so far as it grants relief to the decree-holders, is equally ineffective to bind them, in respect of the rights of persons not parties to such decree (a).

No Court of equity, justice and good conscience, would allow redemption in 1908, on payment only of the amount declared due in 1901, the mortgagees having in the meantime been kept out of possession of the mortgaged property.

If the defendants obtained physical possession for any time, they must account for the profits, if any, taken by them during that period, or lose their interest therefor.

Mortgage—(Continued).**—8.—(Redemption)—(Continued).**

If, though in possession for a term, they, in fact, obtained no produce from the land, they are still liable to allow something for their use and occupation of it.

If the physical possession of the plaintiffs has never been disturbed, under cover of foreclosure-decree, by the defendants or any person claiming under them, then the calculation will be one of unbroken interest from the date of the bond to the date of redemption.

The account must be made without any reference to the foreclosure decree, which, for the purpose of this case, must be regarded as having no existence.

It is not permissible to make any assumption or conjecture as to what would have been the precise result—redemption or foreclosure, if plaintiffs had been joined in the foreclosure suit **Ghasiram v. Jhingwa**, 4 N.L.R. 168.

STANYON, A C.J.

References — (a) 18 C. 164 (180), 19 A. 527 and 31 M. 258, R.

(24) Mortgagor narrating relationship of mortgagor and mortgagee—Mortgagee admitting its correctness by signature—Effect on mortgagee's liability to be redeemed. See **LIMITATION ACT**, No. 23, 10 Bom. L.R. 385.

(25) Suit to redeem mortgage against two parties claiming mortgage money—Interpleader—Plaint containing claim for redemption—Appropriate relief. See **INTERPLEADER SUIT**, No. 1, 10 Bom. L.R. 314.

(26) Purchaser under a decree of puisne mortgage obtaining possession of mortgaged property—Subsequent purchase under decree on the first mortgage—Suit for possession or for redemption by subsequent purchaser. See **CIV. PRO. CODE**, No. 136, 1 Sind L.R. 172.

(27) Mortgage of joint family property executed by father alone—Decree for foreclosure—Sons not made parties—Right of sons to redeem. See **HINDU LAW (ALIENATION)**, No. 16, A.W.N. (1908), 106.

(28) Right of mortgagor to redeem, notwithstanding invalid tender. See **TRANSFER OF PROPERTY ACT**, No. 44, 10 Bom. L.R. 203.

(29) Suit for redemption of usufructuary mortgage, where S. 12 is observed, is amount found due on taking accounts in manner provided by S. 13 of **Dekhan Agriculturists' Relief**

Mortgage—(Continued).**—8.—(Redemption)—(Concluded)**

Act—Ascertainment of consideration for mortgage bond not sufficient. See **ACT XVII OF 1879 (DEKCHAN AGRICULTURISTS' RELIEF)**, No. 4, 10 Bom. L.R. 745.

(30) Whether reversionary heirs of deceased husband of Hindu widow entitled to redeem mortgage made by husband during her lifetime—Whether such heirs have interest in that property. See **TRANSFER OF PROPERTY ACT**, No. 64, A.W.N. (1908), 225.

(31) Suit by zemindar to redeem mortgage made by fixed rate tenant dying without heirs—Zemindar not a person having "interest" in mortgaged property within meaning of S. 91, **Transfer of Property Act**. See **TRANSFER OF PROPERTY ACT**, No. 63, A.W.N. (1908), 210.

(32) Whether it is open to the mortgagor who has brought a suit for redemption and obtained a decree to bring a second suit for redemption. See **CIV. PRO. CODE**, No. 17, 164 P.L.R. 1998.

(33) Acknowledgment by mortgagee of mortgagor's right to redeem to be good for saving limitation need not be addressed to mortgagor specifically. See **LIMITATION ACT**, No. 25, A.W.N. (1908), 226.

(34) Suit for redemption and sale by subsequent mortgagee—Purchaser in execution of prior mortgage decree in possession—Position of such purchaser—Deposit of redemption money after date fixed but before order absolute—Deposit accepted by Court—No formal order extending time—Effect. See **TRANSFER OF PROPERTY ACT**, No. 66, 8 C.L.J. 547.

(35) Redemption suit—Registered mortgage deed not to be varied except by a registered instrument. See **EVIDENCE ACT**, No. 21, 5 A.L.J. 717.

(36) Value of a suit for redemption, not market-value, but amount of mortgage-money. See **ACT VII OF 1887 (SUITS VALUATION)**, No. 2, 5 A.L.J. 713.

(37) Redemption of portion of mortgaged property sold, in execution of a decree for costs, not open to mortgagor—integrity of mortgaged property broken up—decree for redemption of unsold portion possible. See **TRANSFER OF PROPERTY ACT**, No. 69, A.W.N. (1908), 48.

(38) Redemption suit—Valuation—Cost of repairs—Additional lch. See **ACT XVIII OF 1884 (PUNJAB COURTS)**, No. 3-a, 197 P.L.R. 1908.

Mortgage—(Continued).**—7.—(Sub-mortgage).****(1) Sub-mortgages—Right to sell mortgaged property—Frame of suit.**

In a properly constituted suit a sub-mortgagee is entitled to a decree for the sale of the mortgaged property. The mortgagor in such a suit must be impleaded as also the mortgagees, so that the former may have an opportunity of redeeming and the latter may be able to safeguard their interests in regard to the claim put forward by the sub-mortgagee, and see that the amount claimed is due. **Ahmed Ali Khan v. Bilas Rai**, 5 A.L.J. 402=A.W.N. (1908), 191.

STANLEY, C.J. AND KAHAMAT HUSAIN, JJ.

(2) Sub-mortgagee bringing suit and purchasing the rights of his mortgagor—Suit for possession—Notice of sub-mortgage.

The plaintiff obtained a sub-mortgage of the 2nd defendant's interest under a usufructuary mortgage from the first defendant in 1892. He sued on this sub-mortgage and obtained a decree for the sale of the mortgaged property as well as a personal decree. In execution, the land mortgaged to the 2nd defendant under the mortgage of 1892 was put up for sale and purchased by the plaintiff and he obtained possession, but was dispossessed under S. 395 of the Code of Civil Procedure, 1882, at the instance of the 1st defendant who alleged that the mortgage had been redeemed. In a suit by the plaintiff to recover possession, it was held, that, as the rights of a sub-mortgagee could not be affected by transactions between the original mortgagee and the mortgagor effected after notice of the sub-mortgage, the plaintiff was entitled to the possession of the lands, and that he could not be met by the plea of payment of the original mortgage after the date of the sub-mortgage, when the same had not been made before notice of the sub-mortgage. **Narayana Mudali v. Raghavammal**, 18 M.L.J. 462.

WHITE, C.J., AND WALLIS, J.

(3) Rights of sub-mortgagee—Whether a sub-mortgage is transfer of immoveable property. See TRANSFER OF PROPERTY ACT, No. 8-a, 14 Bur. L.R. 323.

—8.—(Usufructuary).**(1) Usufructuary mortgage—Ouster of mortgagee—Adverse possession.**

One of the purchasers of the equity of redemption in a usufructuary mortgage ousted the mortgagee and took possession of the entire

Mortgage—(Continued).**—8.—(Usufructuary)—(Continued).**

mortgaged property, which he retained for more than twelve years; but it was found that he never denied the mortgagor's title, and that the mortgagors had no right to present possession. Held that there was no adverse possession as against the other mortgagor, although there was as against the mortgagees, and that the right of redemption was not lost. the ouster of the mortgagees did not entitle the plaintiff to re-enter into possession. **Ismdar Khan v. Ahamad Husain**, A.W.N. (1908), 25=5 A.L.J. 85=3 M.L.T. 125=30 A. 119.

BANERJI AND AIKMAN, JJ.

References — 27 A. 995, 18 B. 51; 4 C. 327; 12 B.H.C.A.C.J. 180, R.

(2) Mortgage by tenant of absolute occupancy holding—Surrender by tenant of the holding to landlord—Landlord accepting rent from mortgagee in possession—Effect on equity of redemption.

The maxim "*nemo potest esse tenans et dominus*" (a person cannot be at the same time both landlord and tenant of the same premises) does not mean that a landlord cannot own the equity of redemption in respect of a holding as a separate interest. By effecting a valid mortgage a tenant splits his right into two parts, each of which being distinct from the other.

It is competent to a landlord to take a mortgage direct from a tenant with an absolute occupancy right (a).

Where an absolute occupancy tenant made a valid usufructuary mortgage of his holding, and afterwards surrendered his rights in the tenancy to the landlord, it was held that the landlord acquired the equity of redemption of such holding.

Held, also, that the landlord's mere acceptance of rent from the mortgagee in possession did not extinguish his right of redemption.

More acceptance of rent from the man in possession does not make that man a tenant (b). **Bali Ram v. Ram Rao Mahratta**, 4 N.L.R. 57.

DRAKE-BROCKMAN, J.C.

References :—(a) 2 C.P.L.R. 16; 14 C.P.L.R. 9, R. and F. (b) 15 C.P.L.R. 99, F.

(3) Mortgage-deed—Construction of deed—Usufructuary mortgage-deed containing a personal covenant to pay—Covenant does not give a right of sale.

Mortgage—(Continued).**—3.—(Usufructuary)—(Continued).**

Where a mortgage is in other respects a usufructuary mortgage, the insertion therein of a personal covenant to pay the mortgage debt on demand unaccompanied by any hypothecation of the property, the subject of the mortgage, cannot alter the character of the mortgage and give the mortgagee a right to sell in the event of non-payment. **Krishna Bhalchand v. Hari Janardhan**, 10 Bom. L.R. 615.

BATCHELOR AND HEATON, JJ.

Reference:—21 A. 4, F.

(4) *Usufructuary mortgagee dispossessed by Court of Wards—Possession restored on Ward's death—Pro-notes for arrears of rent, executed by tenants in favour of Court of Wards' manager, handed over to mortgagee, without endorsement, suit on—Ss. 18, 43, 55, 57, Act I of 1902 (Madras).*

If the Court of Wards, which, under direction of the Local Government acting under S. 43 of Madras Act I of 1902, has dispossessed a usufructuary mortgagee of the mortgaged property and has administered the estate itself, and on the death of the ward, takes no action under S. 57, its power of superintendence ceases *ipso facto* and the property ceases to be the property of a ward within the meaning of S. 43. So in accordance with cl. (2), S. 55, the usufructuary mortgagee is entitled to be replaced in possession of the mortgaged property. He regains the right to collect the rents and profits, the effect of S. 43 being not to turn the usufructuary mortgagee into a simple mortgagee.

Where the Court of Wards, on the death of the disqualified proprietor, releases the property from its superintendence and hands over to the usufructuary mortgagee, who was dispossessed under S. 43 of the Act, *inter alia*, certain promissory notes executed by tenants, for arrears of rent (due on the mortgaged property), in favour of the Court of Wards' manager,

held that, he having been replaced in possession of the mortgaged lands in accordance with S. 55 (2), is entitled to sue on those pro-notes without obtaining an endorsement from the Court of Wards, because, on the death of the ward, the power of the Court of Wards having ceased, there was no one who could legally endorse the notes.

Property in a promissory note may also pass by "operation of law." **Sowcar Lodd Govinda**

Mortgage—(Concluded).**—6.—(Usufructuary)—(Concluded).**

Doss Krishna Doss Yapu v. Lepati Munappa Naidu, 4 M.L.T. 341.

MILLER AND SANKARAN NAIR, JJ.

(5) *Mortgagee's right to sue—Prior usufructuary mortgage and subsequent hypothecations held by plaintiff.*

Where a person holds a usufructuary mortgage upon a property and two subsequent hypothecations on the same, such mortgagee is entitled to a decree for sale of the property with respect to the hypothecations, but subject to the prior usufructuary mortgage. **Radhakrishniah v. Muthusami Sholagan**, 18 M.L.J. 564.

MUNRO AND ARDUR RAHIM, JJ.

References —30 M. 408, B, 29 A. 385, F.

(6) Decree for sale of property usufructuarly mortgaged, on default of payment on fixed date—Payment of money after fixed date—Effect of default on mortgagor's rights—Rate of interest after decree for sale. See TRANSFER OF PROPERTY ACT, No. 55, 3 M.L.T. 231.

(7) Mortgagee dispossessed of mortgaged property—Right of usufructuary mortgagee to recover mortgage-money by sale of mortgaged property. See TRANSFER OF PROPERTY ACT (IV of 1882), No. 37, 5 A.L.J. 130.

(8) Usufructuary mortgage by tenant—Subsequent relinquishment to landlord—Right of landlord to re-enter—Mortgage or out-and-out sale. See OCCUPANCY HOLDING, No. 2, 12 C.W.N. 878.

(9) Suit for redemption of usufructuary mortgage, where S. 12 is observed, is amount found due on taking accounts in manner provided by S. 13 of Dekkhan Agriculturists' Relief Act—Ascertainment of consideration for mortgage bond not sufficient. See ACT XVII of 1879 (DEKKHAN AGRICULTURISTS' RELIEF), No. 4, 10 Bom. L.R. 745.

(10) Mortgage with possession—Duty of mortgagee to keep account of rents and profits—Interest. See CIV. PRO. CODE, No. 9, 95 P.L.R. 1908.

Moveable property.

(1)—standing timber is under S. 8, Indian Registration Act—S. 8, cl. 25 and S. 4 of the General Clauses Act, See ACT VIII of 1885, No. 24, 7 C.L.J. 152.

(2)—if includes money. See ACCOUNTS, No. 1, 7 C.L.J. 279.

Muafi.

- (1) *Resumption of muafi on muafidar's death—Subsequent settlement on his heirs—Their rights—Right of tenants who are joint owners of the holding, as against the tenant—Acquisition of occupancy right—Punjab Tenancy Act, 1887, S. 5 (1) (b).*

Where after the death of a *muafidar*, the *muafi* is resumed and is settled with his heirs, the ex-*muafidar*'s heirs are entitled to receive the rent from the land and are liable to pay the land revenue assessed upon it. They can exercise the rights of landlords over the tenants who actually cultivate the land. Unless the cultivators can show that they have acquired a right of occupancy in the land, they must be liable to ejection at the will of the ex-*muafidar*'s heirs, with whom the settlement is made. The mere facts that the land is land owned in common by the whole village, and that some members of the proprietary body are the cultivators of the land do not give those cultivators right of occupancy under S. 5 (1) (b) of the Punjab Tenancy Act. **Kartar Singh v. Pura**, 3 P.R. 1908 (Rev.) = 5 P.W.R. 1908 (Rev.) = 180 P.L.R. 1908.

WILSON, F.C.

Multifariousness.

See MISJOINDER.

Municipal Act.

- (1) See ACT III OF 1884 (BENGAL).
- (2) See ACT III OF 1888 (BOMBAY).
- (3) See ACT III OF 1901 (BOMBAY).
- (4) See ACT III OF 1898 (BURMA).
- (5) See ACT IV OF 1884 (MADRAS).
- (6) See ACT III OF 1904 (MADRAS).
- (7) See ACT I OF 1900 (N.W.P.).
- (8) See XX OF 1891 (PUNJAB).

Municipality.

- (1) *Water connection—Rules framed by the Municipality—Construction of the rules.*

The plaintiff, the owner of a house in Surat, took in 1898 a water connection from the main pipe laid by the defendant Municipality. Under the rules, he was chargeable with one rupee a month for the water supplied to him and the condition was that his house was not to be inhabited by more than three families. The defendant Municipality made a new set of rules in 1905, under which they called upon the plaintiff to take a separate water connection for each of the families living in his house: and they threatened to cut off the connection

Municipality—(Concluded).

in case of non-compliance. The plaintiff brought this suit to restrain the Municipality from so doing.

Held, that under the rules so long as the plaintiff occupied a house not inhabited by more than three families, he was entitled to the water supply. **The Surat City Municipality v. Tyabali Daudhai**, 10 Bom. L.R. 622 = 32 B. 460.

BASIL SCOTT, C.J., AND KNIGHT, J.

- (2) Suit against Municipal Board, must be brought in the corporate name of the Board, not in the name of the Chairman. See ACT I OF 1900 (MUNICIPALITY), No. 1, A. W. N. (1908), 165.

(3) Municipal Corporation acting *bona fide*—Imperative duty and permitted act—Courts, how far can interfere with acts of a corporation. See BOMBAY ACT (III OF 1901, MUNICIPALITY), No. 1, 1 Sind L.R. 228.

(4)—Acquisition of land by Municipality—Proposal to acquire—Acceptance of proposal—Difference as to price—Completed contract—Power of Court to fix price in cases of difference. See ACT III OF 1901 (DISTRICT MUNICIPALITY), No. 2, 10 Bom. L.R. 617.

(5) Power of Municipal Commissioner to remove objectionable structures—Exercise of the power—Discretion vested in the commissioner—Court's interference with the discretion—Commissioner can act through agent—Right of the party to be heard—Injunction to restrain Commissioner from pulling down building. See ACT III OF 1888 (CITY OF BOMBAY MUNICIPALITY), No. 1, 10 Bom. L.R. 821.

Murder.

Whether, disqualifies murderer from succeeding to the estate of the murdered person. See HINDU LAW (INHERITANCE), No. 1, 18 M.L.J. 70.

Mutation proceedings.

- (1) *Presumption—Burden of proof.*

Held, that the mutation in favour of the defendant was surrounded by suspicious circumstances and that he had failed to prove that he was legitimate son of his father. **Kadir Bukhash v. Aziz Muhammad**, 200 P.L.R. 1908.

* SIR WILLIAM CLARK, C.J., AND REID, J.

(1-a) Whether mutation of names or transfer of possession will confer title, where law requires registered deed. See TRANSFER OF PROPERTY ACT, No. 3, 11 O.C. 301.

Mutation proceedings—(Concluded).

(2) Mutation *puttah* referring to old *puttah* creating permanent interest—Purpose of reference being to show proportionate rent—*Puttah* is confirmatory. See EJECTMENT, No. 5, 8 C.L.J. 513.

(3) Assertion of proprietary right by mortgagee after invalid foreclosure proceedings, coupled with mutation in revenue records in his favour, whether amounts to adverse possession. See MORTGAGE (FORECLOSURE), No. 6, 90 P.L.R. 1908.

Mutts.

Conditions of election of *mahants* to mutts standing in the relation of superior and inferior—Capacity of *mahants* to transfer their powers. See RELIGIOUS ENDOWMENTS, No. 7, 8 C.L.J. 499.

Mutwali

—, whether infant can be appointed. See RELIGIOUS ENDOWMENT, No. 5, 8 C.L.J. 196.

Native states.

(1) Location of British troops in—Power of Cantonment authorities as to grant or user of land—Treaty, absence of—Power restricted to military purposes—Land belongs to State—Parsi Tower of Silence, grant of land for—Control of Cantonment authorities.

The Hyderabad Subsidiary Force which had its head-quarters in the Secunderabad cantonment, was a force in the employment of the East India Company and commanded by the Company's officers, but maintained, by agreement, in Hyderabad territory for the protection of the Nizam. There never was in existence any treaty prescribing the limits of the powers of the Nizam's officers on the one hand, and the military commander commanding the Hyderabad Subsidiary Force on the other, with respect to the management, control, and disposition of the cantonment and the land comprised in it. When the Nizam's Government admitted a British force within its territory, and allotted to it Secunderabad cantonment as its head-quarters, it no doubt, by necessary implication, conveyed to the military authorities all powers of jurisdiction, control and management incident to maintaining the efficiency and the discipline of the troops, the peace and good order and convenient use of the cantonment. But it would be going long way beyond this to hold that the officer commanding the troops was empowered to alienate, in perpetuity, land forming part of the cantonment

Native states—(Continued).

and undoubtedly Hyderabad territory for a purpose wholly unconnected with military requirements.

The appellants, who were members of the Parsi community, claimed that the founders of the Parsi Tower of Silence, which stands on a portion of certain land, situated in the Secunderabad cantonment, were in their life-time owners of the land in question, and that the property had devolved upon themselves as descendants, and representative in title, of the original founders. The Respondents, who were also members of the Parsi community, contended that the land in question had been granted to the whole Parsi community for a public purpose, and to enure for the benefit of the community generally for all time by the cantonment authority. The most important document relied upon by the Appellants was issued by an Officer of the Hyderabad State and purporting to express a transaction, by which the State had assented to the grant of the land in question to the founders, and directed possession of it to be delivered to them. Another document in evidence also obtained on behalf of the founders, through their agent, purported to be issued by the authority of the Brigadier commanding the Hyderabad Subsidiary Force and to certify that the Parsis of Secunderabad had permission to enclose the land in question, which was given for a tower to be built on it.

Held—That the considerations set out above must be borne in mind in estimating the effect of the two documents, that the first, emanating from the State, purported to deal with and enforce, a grant of the land to the founders by name, and the delivery of possession to them, that the second document, emanating from the cantonment authorities, did not deal with title or possession, but gave permission to use the land, already conveyed, for the particular purpose of a Tower of Silence, and to enclose the land, which were matters obviously within the discretion of the commanding officer, and that the effect of the two documents, was to show a good title in the founders, and not in the Parsi community. **Pestonji Jivanji v. Shapurji Edulji Chinoy**, 12 C.W.N. 465 (P.C.).

LORD ROBERTSON, LORD COLLINS, AND SIR ARTHUR WILSON.

(2) Appeal from Governor-General's agent in Bhopal to Privy Council, whether allowable. See ARBITRATION, No. 3, 12 C.W.N. 585 (P.C.).

Native states—(Concluded).

(3) Tipperah Raj—Succession to the zemindari—Jurisdiction of British Court. See JURISDICTION (GENERAL), No. 4, 12 C.W.N. 777.

Necessity.

Legal necessity depends on facts of each case. See HINDU LAW (REVERSIONERS), No. 6, 8 C.L.J. 458.

Negligence.

(1) Municipality allowing by their, storm water to flood another's land—Mistake. See TORT, No. 1, 10 Bom. L.R. 498.

(2) Mortgage—Notice—Whether failure to obtain title-deeds will be gross negligence, under S. 78, Transfer of Property Act. See TRANSFER OF PROPERTY ACT, No. 41, 4 M.L.T. 217.

(3) Execution of decree for rent due—Third person's property unintentionally sold in execution—Third person suing decree-holder for damages—Decree-holder not liable as for negligence, but for conversion—No contributory negligence, where action not based on negligence. See TORT, No. 5, 129 P.R. 1908.

Negotiable Instruments.

(1) *Dishonoured bill—Plaintiff taking it up and paying it—Plaintiff's right to sue.*

After a bill was dishonoured, the plaintiff, who had endorsed it over, was called upon to take it up, and he did take it up.

He had given it as conditional payment to his endorsee, and on its being dishonoured he paid the endorsee and got back the bill.

Held, that, under such circumstances, the plaintiff had a clear right to sue (a). **Alagappa Chetty v. Karuppayya Pillai**, 3 M.L.T. 239.

WALLIS, J.

Reference.—(a) 30 M. 441, F.

(2) Hindu joint family firm—Credit of the firm pledged by a negotiable instrument by a member with authority to do the same—Liability of the firm. See HINDU LAW (JOINT FAMILY), No. 10/11, 10 Bom. L.R. 668.

(3) Whether plaintiff acquired title by negotiation of promissory note, where previous endorsement was not struck out and a bare endorsement in blank and delivery were made to plaintiff's master who gave it to plaintiff for filing suit on it. See PROMISSORY NOTE, No. 1, 41 Bur. L.R. 25.

Negotiable Instruments Act.

See ACT XXVI OF 1881.

Noabad.

Noabad taluk, nature of settlement of—Resettlement of such taluk, meaning of. See LIMITATION ACT, No. 48, 8 C.L.J. 470.

Non-joinder of parties.

Non-joinder of necessary parties—Effect. See PARTNERSHIP, No. 4, 1 Sind L.R. 191.

Northern India Canal and Drainage Act.

See ACT VIII OF 1878.

N.W.P. and Oudh Kannugos and Patwaris Act.

See ACT IX OF 1889.

Notice.

(1)—to quit, whether necessary for maintainability of suit for ejectment of defendant, where defendant refuses to pay reasonable rent and sets up *mokurass* pottah. See ACT VIII OF 1865, No. 1, 7 C.L.J. 191.

(2)—of claim under S. 77 of Indian Railways Act on whom to be served. See ACT IX OF 1890 (RAILWAYS), No. 5, 12 C.W.N. 450.

(3) Service of notice by post—Presumption—Question of fact. See CIV. PROC. CODE, No. 14, 7 C.L.J. 251.

(4) Proof of service of, under S. 167 of the Bengal Tenancy Act. See POSSESSION, No. 3, 7 C.L.J. 262.

(5) Mortgagor appearing to contest defective notice of foreclosure issued under Reg. XVII of 1806 and offering to pay proper persons—Whether such appearance and offer amount to waiver of right to take advantage of defects in the notice in a subsequent suit by him for redemption. See MORTGAGE (REDEMPTION), No. 8, 28 P.R. 1908.

(6) Purchaser of property, subject to unregistered mortgage not compulsorily registrable—Purchaser having notice of such mortgage before registration of sale-deed—Whether mortgage binding on purchaser. See REGISTRATION ACT (III OF 1877), No. 19, A.W.N. (1908), 99.

(7) Four days' notice whether sufficient in law. See APPEAL (SECOND APPEAL), No. 2, 3 M.L.T. 293.

(8) Father of minor son having notice of fact—Minor son cannot plead want of notice. See CONTRACT ACT, No. 38, 137 P.L.R. 1908.

(9) Execution of decree—Absence of notice to judgment-debtor—Proclamation of sale—Sale at undervalue—Non-issue of notice not

Notice—(Concluded).

material irregularity under S. 311, C.P.C., but irregularity in proceedings anterior to conducting sale. See CIV. PRO. CODE, No. 210, 10 BOM. L.R. 752.

(10) Application for transmission of decree—Execution—Court which should issue notice—Discretion—Court to which decree is to be transmitted to issue notice See CIV. PRO. CODE, No. 118, 12 C.W.N. 897.

(11) Service of notice—Service on the outer door of the house in which the person to whom the notice was addressed works as an employee—Not good service. See CIV. PRO. CODE, No. 79, 8 C.L.J. 294.

(12)—to quit—Proper form—Addition of clause charging for holding on—Waiver. See LANDLORD AND TENANT, No. 24, 12 C.W.N. 1059

(13)—of suit for injunction, whether necessary against officials acting not as such—Civ. Pro. Code, S. 424 See COURT OF WARDS, No. 1, 12 C.W.N. 1065.

(14) Contents of a valid notice under S. 51 of Reg. VIII of 1793 (Bengal Decennial Settlement). See REG. VIII OF 1793 (BENGAL DECENNIAL SETTLEMENT), No. 1, 8 C.L.J. 329.

(15)—of action whether necessary, under S. 156 (1), Local Boards Act, in suit for injunction. See ACT V OF 1884 (LOCAL BOARDS), No. 2, 4 M.E.T. 209.

(16) Notice to pleader if notice to client. See PRACTICE, No. 17, 18 C.W.N. 142.

(17) Landlord and tenant—Notice to quit—Demand of increased rent or ejectment in the alternative. See LANDLORD AND TENANT No. 81, 18 C.W.N. 146.

(18) Hundi payable at sight—Holder agreeing to arrangement with acceptor for payment—Notice of dishonour, omission to give—effect on drawer's liability. See ACT XXVI OF 1881 (NEGOTIABLE INSTRUMENTS), No. 2, 12 C.W.N. 644.

(19) Conditions under which tenant will not be entitled to the usual notice to quit. See LANDLORD AND TENANT, No. 3, 3 M.L.T. 265.

(20) Whether transferee to be fixed with notice, if he has not exercised utmost care. See TRANSFER OF PROPERTY ACT, No. 8-a, 14 BUR. L.R. 329.

Oaths Act.

See ACT X OF 1873.

Occupancy holding.

(1) *Non-transferable—Purchase by landlord in execution of money-decree, whether subject to previous mortgage—Estoppel—Evidence Act (I of 1872), S. 115.*

Where in execution of a money decree, the landlords of a non-transferable occupancy holding purchased the holding after it had been mortgaged by the tenants in favour of a third party.

Held, that in a suit by the latter to enforce the mortgage, the landlords were not estopped from setting up the defence that the holding was not transferable without their consent.

That the sale of the holding by the landlords did not amount to a representation that it was transferable without their consent, but only that it was transferable with their consent.

That the landlords did not merely purchase the equity of redemption, the English law of mortgage not being applicable to the case.

The law of estoppel in force in this country is contained in S. 115 of the Evidence Act (a). **Bibi Asmatunnessa Katun Saheba v. Harendra Lal Biswas**, 12 C.W.N. 721 = 8 C.L.J. 29.

RAMPINI, C.J., AND RYVES, J.

Reference :—(a) 11 C.W.N. 76, D.

(2) *Transferability—Usage—Growing usage not sufficient—Usufructuary mortgage by tenant—Subsequent relinquishment to landlord—Right of landlord to re-enter—Mortgage or out-and-out sale*

In 1894 an occupancy ryot executed a usufructuary mortgage of the holding, put the mortgagee in possession, and though it was arranged that the tenant would continue to pay rent to the landlord, the tenant left the village and abandoned all connection with the land. In 1901, the tenant executed a deed of relinquishment in favour of the landlord and surrendered the land to him, and it did not appear that he paid any rent since.

BRETT, J. *held*, on second appeal, upon a consideration of the terms of the mortgage-bond and the circumstances connected with the transaction, that although the document purported to be a usufructuary mortgage for sixty years, the transaction was really an out-and-out sale and the deed was drawn up in that form in order to evade the provisions of law against the transfer of occupancy-holdings.

Occupancy holding—(Continued)

Held by Rampini, C.J. and Mitra, J.—That apart from such considerations, the moment the deed of relinquishment was executed by the tenant, the landlord became entitled to re-enter.

A growing usage of transferability of occupancy holdings is of no effect against the landlord. The usage, to be effective, must have already grown up (a). **Rajendra Kishore Adhikari v. Chandra Nath Dutt**, 12 C.W.N. 878

RAMPINI, C.J. AND MITRA, J.

References—(a) 10 C.W.N. 497 and 10 C.W.N. 719, *relied on*.

(3) *Non-transferable—Transfer, if may be questioned by transferor's heirs—Transfer by will—Void or voidable—Landlord's option.*

The transfer of an occupancy holding which is not transferable by local custom or usage, is not a void transaction. It is binding between the parties, namely, the transferor and the transferee, and all persons claiming through them, and is voidable only at the option of the landlord.

The heirs of an occupancy raiyat would therefore be bound by a transfer of the holding made by will (a). **Hari Das Bairagi v. Uday Chandra Das Bairagi**, 12 C.W.N. 1086=8 C.L.J. 261.

DOSS, J.

References.—(a) 1 C.W.N. 679, 2 C.W.N. cclxix, 6 C.W.N. 624, 11 C.W.N. 76, *relied on*.

(4) *Validity of mortgage by occupancy tenant.*

A temporary transfer, whether in the form of a mortgage or otherwise, by an occupancy tenant, in favour of his land-holder, is valid. **Mithan Kunwar v. Musammat Behsa**, 11 O.C. 345.

PIGGOTT, A.J.C.

References.—(1) 2 O.C. 204; (2) 6 O.C. 331, *R.*

(5) *Transferability of, local usage of—Evidence to prove—Transferee allowed to hold and pay rent as mirafatdar—Mutation of name on payment of selami. See LANDLORD AND TENANT, No. 8, 12 C.W.N. 539.*

(6) *Tenant dispossessed by auction purchaser upon sale by landlord—Suit to recover—Limitation. See ACT VIII OF 1885 (BENGAL TENANCY), No. 32, 13 C.W.N. 108.*

(7) *Succession to occupancy—Punjab Tenancy Act, ss. 111 and 112—Right of person to settle, by written agreement, a course of succession*

Occupancy holding—(Concluded).

different from that prescribed in the Act. See ACT XVI OF 1887 (PUNJAB TENANCY), No. 13, 130 P.R. 1907=76 P.L.R. 1908.

Occupancy rights.

(1) *Suit by landlord to resume occupancy right after the death of widow of late tenant—Plea of adverse possession by one holding under widow, validity of.*

In a suit by proprietors to eject a person who set up title as occupancy tenant, immediately after the death of the widow of the previous tenant, the defendant set up adverse possession, based on mutation of names in his favour during the widow's lifetime, on a subsequent possession as occupancy tenant and on an unsuccessful application by the father of some of the plaintiffs, and failure by them to sue in a Civil Court as directed by the Revenue authorities. *Held*, that the plaintiff was not bound to sue till after the death of the widow and that S. 9 of the Tenancy Act would preclude the acquisition by mere lapse of time of a right of occupancy. The suit was, therefore, not barred by limitation and the defendant could not set up a claim by adverse possession. *Held* also, that the plea that the defendant's possession was adverse to his adoptive mother, and through her to the plaintiffs, was not valid. **Ganda Singh v. Kaim Khan**, 60 P.R. 1908=109 P.W.R. 1908.

REID, J.

References.—43 P.R. 1895, *R.*, 73 P.R. 1900, and 12 C. 484 (P.C.), *D.*

(2) *Succession to, on the death of a tenant-in-common—Alienees not joint-tenants where their shares are definitely specified—Jus accrescendi—Meaning of "occupied" in S. 59, Act XVI of 1887 (Punjab Tenancy).*

A mortgage or other alienation in favour of several persons, in which the shares of the several alienees are definitely specified, does not constitute those alienees joint-tenants. They are tenants-in-common and there is no *jus accrescendi* between them.

Semle.—The word "occupied" in S. 59, Act XVI of 1887, means actually occupied and does not include an occupation which is merely such by implication of law. **Khan Singh v. Hardit Singh**, 100 P.R. 1908.

BATTIGAN AND LAL CHAND, JJ.

(3) *Succession to—Presumption from long possession.*

Occupancy rights—(Concluded).

In a case of succession to occupancy rights by the collaterals of the last tenant, *held* that, where the father of the deceased tenant, who was entered in the annual papers as a hereditary cultivator, is shown to have been in possession of the holding for 50 years, it may be presumed that it descended to the father from the grandfather **Sipadar Khan v. Kadheru**, 101 P.R. 1908

RATTIGAN AND LAL CHAND, JJ.

(4) Acquisition of—Resumption of *muafi* on *muafidar's* death—Subsequent settlement on his heirs—Their rights—Rights of tenants who are joint owners of the holding as against the heirs. See **MUAFI**, No. 1, 3 P.R. 1908 (Rev.).

(5) Origin and presumption as to occupancy. See **WAJIB-UL-HAJJ**, No. 3, 4 N.L.R. 149

Official Assignee.

Competency of Official Assignee to bring suit on behalf of insolvent, where order for withdrawal of petition for insolvency was passed by Court, subsequent to vesting order, but rules for withdrawal and revocation were not drawn up. See **INSOLVENCY ACT** (11 and 12 Vic. c. 40), No. 1, 10 Bom. L.R. 178.

Order.

(1)—refusing to re-admit appeal rejected for appellant's failure to furnish security for costs of respondent, under S. 549, Civ. Pro. Code. See **CIV. PRO. CODE**, No. 298, 5 A.L.J. 109

(2)—passed on execution application opposed on the ground that property was trust property, whether appealable—Proper course is to bring separate suit. See **CIV. PRO. CODE**, No. 148, 18 M.L.J. 21.

(3)—refusing to grant sale-certificate whether appealable—Conditions for being appealable. See **CIV. PRO. CODE**, No. 143, 7 C.L.J. 436.

(4)—dismissing application to set aside sale for non-issue of notice to judgment-debtor and for consequent sale at under-value—Order falls under S. 244 (c), C.P.C., and appealable as decrees. See **CIV. PRO. CODE**, No. 210, 10 Bom. L.R. 752.

(5)—passed by Judge under S. 332 not one referred to in Art. 14, Limitation Act—Order passed under S. 332, C.P.C., restoring possession given in execution of decree is one made in execution proceedings by the Court and not Civil Court's order in proceeding other than suit—Art. 13, Limitation Act, inapplicable to such case. See **LIMITATION ACT**, No. 47, 10 Bom. L.R. 749. •

Order—(Concluded).

(6)—giving leave to withdraw suit and file fresh one on same cause of action—Registrar granting leave to institute suit—Order *ultra vires*—Order one directing plaint to be returned to plaintiff. See **CIV. PRO. CODE**, No. 234, 12 C.W.N. 921.

(7)—directing re-opening of settled accounts is a decree. See **CIV. PRO. CODE**, No. 1, 12 C.W.N. 1102.

(8) Compensation money paid to Hindu widow—Reversioner's application for reference to Civil Court—Order by Judge on reference directing refund of money already paid by Collector—Order not one under S. 32, Land Acquisition Act—Incompetency of Judge to proceed under S. 32—No appeal from order under S. 32—Power of High Court to interfere in revision. See **ACT I OF 1894 (LAND ACQUISITION)**, No. 19, 12 C.W.N. 1039.

(9)—sanctioning compromise under S. 257-A, C.P.C., whether new decree or order subsequent to decree directing payment within the meaning of S. 230 (b), C.P.C. See **CIV. PRO. CODE**, No. 121, 4 M.L.T. 233.

(10)—transgressing decree—Effect. See **CIV. PRO. CODE**, No. 198, 4 M.L.T. 352.

Order Sheet.

Ex parte order in, evidentiary value of. See **CIV. PRO. CODE**, No. 14, 7 C.L.J. 251

Orthamulyani lease

—, suit for possession based on title of—Article of Limitation Act applicable, S. 144. See **LIMITATION ACT**, No. 77, 3 M.L.T. 241.

Oudh Laws Act.

See **ACT XVIII OF 1876 (OUDH)**.

Ouster.

Plaintiff entitled to joint possession—Plaintiff ousted from such possession—Suit by plaintiff for exclusive possession—Right of plaintiff to damages for ouster. See **DAMAGES**, No. 2, 3 M.L.T. 277.

Owely-money.

—due to other share's of joint estates by a co-sharer, creation of charge for, on share allotted to him in partition—Mortgage of his undivided share—priority. See **PARTITION**, No. 4, 12 C.W.N. 373.

Pakky adat agency.

- (1) *Place of performance of a contract by a pakka adatia—Jurisdiction.*

In the case of *Pakkyadat* agency, the place of payment is the place where the constituent resides unless he has chosen to fix another place by express direction. **Kedarmal Bhurmal v. Surajmal Govindram**, 10 Bom. L.R. 1280.

CHANDAVARKAR AND BATCHELOR, JJ.

Paper Currency Act.

See ACT XX OF 1882.

Pardanishin lady.

Attestation of zurpeshgi patta executed by. See TRANSFER OF PROPERTY ACT, No. 31 13 C.W.N. 40.

Parsi Marriage and Divorce Act.

See ACT XV OF 1865.

Parties.

(1) *Assignment pendente lite—Addition of assignee as co-defendant after the period of limitation.* See LIMITATION ACT, No. 31, 3 P.R. 1907.

(2)—to suit for sale of mortgaged property by prior incumbrancer—Non-joinder of puisne mortgagees, effect of. See MORTGAGE (SALE), No. 1, 64 P.R. 1908.

(3) *Beneficiary joined as co-plaintiff on appeal when plaintiff-trustee surrenders decree.* See HINDU TEMPLE, No. 1, 12 C.W.N. 946.

(4) *Whether Crown is a necessary party in suit relating to mosque.* See MAHOMEDAN LAW (WAKF), No. 4, 13 C.W.N. 26.

(5) *Secretary of State or corporation for whose benefit land is acquired—if necessary party to a reference under Land Acquisition Act.* See ACT I OF 1894 (LAND ACQUISITION), No. 12, 13 C.W.N. 116.

(6) *Suit for partition by putnidars against durputnidars of co-putnidars—Who are necessary parties to suit.* See PARTITION, No. 3, 7 C.L.J. 449.

Partition..

- (1) *Partition, partial—Co-owners, not members of joint family—Suit, if maintainable.*

One of the co-owners of an estate sued the other co-owners for partition of chowkidari chakran lands of one village only of the estate.

Held, that the reasons against the partial partition of joint family property did not apply to such a case and the suit was maintainable(a).

Partition—(Continued).

Syed Habibur Rasul Abdul Faiz v. Ashita Mohan Ghosh, 12 C.W.N. 840.

RAMPINI AND SHARFUDDIN, JJ.

References:—(a) 28 A. 39, F; 7 C. 577, commented upon; and 1 C.L.J. 40, relied on.

- (2) *Common village land for tethering cattle, whether open to partition among proprietors.*

Common land in a village, which the co-sharers have been in the habit of tethering cattle on, is not to be regarded as land dedicated as such to a common purpose. So, though the Record of rights, describing such lands as joint property, is silent as to their liability to partition, yet from the right of transfer of such lands provided for by the said Record, a right to bring them to partition is impliedly inferrible. **Makhan Singh v. Ishar Singh**, 136 P.R. 1906=118 P.L.R. 1908.

REID, C.J.

- (3) *Partition, suit for—Party—Co-putnidar and not darputnidar necessary party*

A person holding a permanent interest, though an interest of an inferior grade, may bring a suit for partition, as against persons who hold interests of a superior grade (a).

In a suit for partition by *putnidars* against *darputnidars* under his *co-putnidars*, the *co-putnidars* must be made parties; but a *darputnidar* is not a necessary party in a suit for partition (b), if his *putnidar* is made a party and if such a *putnidar* does not wish to avoid the responsibility which attaches to a party in a partition suit, that is, to see that the partition is carried out in a fair and equitable manner. **Upendra Chandra Singh a Roy v. Mahomed Faiz Chowdhry**, 7 C.L.J. 449=12 C.W.N. 670.

MITRA AND CASPERSZ, JJ.

References.—(a) 24 C. 575; 1 C.L.J. 40; 5 C.L.J. 643, relied on; (b) 3 C.L.J. 205, R.

- (4) *Mortgage of undivided share—Allotment of property on partition—Charge for owelty money—Priority.*

In the absence of any suggestion or evidence that the partition of a joint estate was unfairly or improperly made to defeat the claims of creditors, the sharers thereof, who have to receive sums of money by way of owelty from a co-sharer under a partition decree, creating a charge on the allotment made to him, have priority over the mortgagees of his undivided share in the joint estate.

Partition—(Continued).

The fact that the mortgagor co-sharer entered into possession of the allotment made to him, before paying the owelty-money for which there was a charge created, did not alter or affect the position. **Shahebzadah Mahomed Kasim Shah v. Robert Savi Hills**, 12 C.W.N. 373—35 C. 388.

MACLEAN, C.J., STEPHEN AND WOODROFFE, JJ.

- (5) *Partition—Mode of partition—Shareholder's right to retain possession—How to deal with occupancy holding—Act XVII of 1887, Ss. 110 and 116—Mouza Pakki Bhatli, Tahsil Fazilka*

In the partition case of a joint holding of land in Mouza **Pakki Bhatli**, Tahsil **Fazilka**:

Held, that possession should be respected up to the extent of each shareholder's share in each of the different classes of land, and, as regards the area occupied by hereditary tenants, the holding of each tenant should not be split up into pieces, but that each such holding should go as a whole. **Chandan Khan v. Fatah Mohammad**, 2 P.W.R. 1908 (Rev).

DOUIE, FINANCIAL COMMISSIONER.

- (6)—*of joint property—Portion omitted by mistake—Fresh suit for partition or joint possession, if maintainable—Co-owner, adverse possession by.*

Where, in a suit for the partition of joint property, by reason of a mistake of the parties which was shared by the Commissioner who was appointed to make the partition, a certain portion of the property was omitted from the report and the final decree did not deal with the lands comprised in that portion.

Held—That the effect of the decree was to leave unaffected the joint title and possession of the parties in the lands omitted in the decree.

That such lands may be partitioned in a subsequent suit at the instance of one of the parties.

A mere determination of the shares by the preliminary decree is not tantamount to partition.

The entry into and possession of land under the common title by one co-owner will not be presumed to be adverse to the others, but will ordinarily be held to be for the benefit of all.

A co-tenant will not be permitted to claim the protection of the statute of limitation, unless it clearly appears that he has repudiated the

Partition—(Continued).

title of his co-tenant and is holding adversely to him. It must further be established that the fact of the adverse holding was brought home to the co-owner.

The possession of a wrong-doer cannot be constructively extended over lands not actually in his possession. **Jogendra Nath Roy v. Baladeb Das Marwari**, 12 C.W.N. 127—6 C.L.J. 735.

*MOOKERJEE AND CASPERSZ, JJ.

- (7) *Jurisdiction of Civil and Revenue Courts—Act XIX of 1873, Ss. 132, 241—United Provinces Land Revenue Act (III of 1901, Local), S. 233 (h).*

Where the whole of a village was under partition in the Revenue Court, and that Court directed that the village should be divided into 26 mahals, one of which, the mahal of the non-applicants for partition, should consist of 12 *pattis*, but rightly or wrongly land which should have formed part of the mahal of the non-applicants was allotted to one of the other mahals, **held**, that this was a question relating to the partition or union of mahals, and the remedy of the party aggrieved was an appeal against the order confirming the partition and not a suit in the Civil Court. **Tirbeni Sahai v. Jagannath**, 5 A.L.J. 725.

BANERJI, J.

Reference:—20 A.W.N. 11, D

(8)—*of lands not paying revenue to Government, suit for, pending till final decree passed under S. 396, C.P.C., ordering division by metes and bounds—Competency of Court to pass such decree of its own accord. See Civ. Pro. Code, No. 243, 18 M.L.J. 23.*

(9) *Decree for—Power of Court to order sale instead of division. See Act IV of 1893 (PARTITION), No. 1, 10 Bom. L.R. 23.*

(10)—*between co-owners, whether injuriously affects rights of tenants possessed before partition. See LANDLORD AND TENANT, No. 6, 5 A.L.J. 237.*

(11) *Effect of, on joint liability of tenants to pay entire rent to landlord—Separate suit for rent against each tenant, whether necessary. See LANDLORD AND TENANT, No. 14, 12 C.W.N. 568.*

(12) *Right of purchaser of portion only of shamilat land to claim partial—of it. See SHAMILAT LAND, No. 1, 32 P.R. 1908.*

Partition—(Concluded)

(18) Between landlords—Whether it can affect the rights of tenant. See **LANDLORD AND TENANT**, No. 10, 2 A.L.J. 588.

See ALSO CASES UNDER **HINDI LAW, PARTITION**.

(14) Lists of money bonds and lands prepared by members of a joint Hindu family indicating what portion has gone to the share of each at a private partition, whether to be deemed instruments of partition within the meaning of S. 2 (15) of the Stamp Act. See **STAMP ACT** (II of 1899), No. 4, 10 Bom. L.R. 728.

(15) Plaintiff entitled to a share only of joint property suing in ejectment—Whether suit can be treated as one for partition. See **EJECTMENT**, No. 4, 4 M.L.T. 215.

(16) Deed of partition not registered, value of. See **REGISTRATION ACT**, No. 5, 4 M.L.T. 354.

(17)—is a right incident to that of co-owners.—Agreement not to partition for an indefinite period, not enforceable. See **CO-OWNER**, No. 3, 5 A.L.J. 672.

(18) Suit for—Civ. Pro. Code, S. 562—Remand—Appeal—Court-fee. See **APPEAL**, No. 3, A.W.N. (1908), 40.

(19)—method of—Court can allot to the share of one co-partener property alienated by him, if interests of other co-parteners allow it. See **HINDI LAW (PARTITION)**, No. 1, 17 M.L.J. 617.

(20) Act III of 1901 (U.P. Land Revenue), S. 233 (4), N.W.P. Land Revenue Act, 1873, Ss. 132, 241—Civil and Revenue Courts—Jurisdiction. See **ACT XIX OF 1873 (LAND REVENUE, N.W.P.)**, No. 1, A.W.N. (1908), 274.

(21) Maintainability of suit for partition by assignee from purchaser in execution-sale—Insolvency of judgment-debtor prior to execution sale. See **INSOLVENCY ACT**, No. 2, 4 M.L.T. 188.

Partition Act

See **ACT IV OF 1893**.

Partnership.

(1)—*Fraud by co-partner—Hatchitta—Material alteration by a partner to set up exclusive title to debt—Suit on behalf of firm—Maintainability—Claim, if to be disallowed to the extent of the interest of the fraudulent partner—Apportionment, before dissolution.*

A fraud committed by a partner while acting on his own separate account and not as agent for the firm is not imputable to the firm

Partnership—(Continued).

although had he not been connected with the firm he might not have been in a position to commit the fraud.

Where one of the partners of a firm sued to recover a debt which was really due to the firm on the allegation that it was due to himself and not to the firm and his suit was dismissed on the ground that he had materially altered the *hatchitta* executed by the debtor by striking out the other partner's name without the debtor's consent.

Held, that the other partners were not precluded from suing for the debt on behalf of the firm, making the first-mentioned partner a defendant in the suit (a).

That it was not open to the Court in such a suit to give them a decree for such portion only of the claim as represented their share in the firm.

Questions regarding the share of the debt to be allocated to the partners *inter se* can only be decided when the accounts of the partnership are taken. **Munshi Basiruddin Mullick v. Surja Kumar Naik**, 12 C.W.N. 716.

HARRINGTON AND HOLMWOOD, JJ.

References —(a) 2 R.R. 390 = 4 Term. Rep. 320. 33 C. 812, D.

(2) *Expulsion of one member by others, if causes dissolution—Contract Act (IX of 1872), S. 253 (7)—Suit for account or dissolution by excluded partner—Limitation—Limitation Act (XV of 1877), Sch. II, Arts. 106 and 120.*

Under the Indian law, there is no dissolution of partnership, when one partner expels the other.

A suit by the expelled partner for account or for dissolution of partnership and a share of the profits is not governed by Art. 106, but by Art. 120 of Sch. II of the Limitation Act, and is within time, if brought within six years of the date of expulsion.

Under the Indian law, a partner can be expelled only by an order of the Court. **Dwarka Das Karnani v. Chuni Lal Daga**, 12 C.W.N. 455.

RAMPINI AND SHARFUDDIN, JJ.

(3) *Suit for dissolution of—Necessary parties—Party, death of—Substitution of heirs, not made in time—Abatement of suit.*

Partnership—(Continued),

A suit for dissolution and winding-up of a partnership involves the determination of the plaintiff's share and the taking of accounts, and the plaintiff's share could not be determined definitely without making all the parties interested in the partnership, parties to the suit, and the accounts could not be properly taken in the absence of any of them.

If, on the death of one of the defendants, his heirs are not made parties to the suit by substitution in time, the whole suit is to be dismissed, even where no relief against the deceased defendant or his heirs was asked for specifically (a). **Srinath Pal v Hari Charn Pal**, 7 C.L.J. 266.

RAMPINI AND SHARFUDDIN, JJ

Reference —(a) 14 C. 791, *R and F*.

(4) *Presentation of plaint by managing member of the partnership—Non-joinder of necessary parties—Effect—S. 263, Contract Act—C.P.C., S. 27.*

Though, under S. 263, Contract Act, the rights and obligations of partners continue, after the dissolution of the partnership, in all things necessary for the winding up of the business, yet it is only agents of a special kind that are recognised by the C.P.C., as having authority to make an appearance, or application, or do an act, on behalf of party to the suit. No ordinary agent is recognised, nor has a partner, as such, any power to act for, or represent, a co-partner, except for the purpose of accepting service of summons (S 74, C.P.C.)

Hence, a plaint, which purports to be in the individual names of the partners, but is signed and verified by one of them as managing partner, and which is presented by a pleader having a vakalatnama from and after the dissolution of the partnership, is not duly filed or presented. Such a presentation is not a mere irregularity which can be cured by an amendment. S. 27, C.P.C., only applies where a suit has been instituted in the name of the wrong person as plaintiff, or, where it is doubtful whether it has been instituted in the name of the right plaintiff, and it is not intended to cover the case of the non-joinder of a necessary party.

Where a claim is time-barred at the time necessary party expresses his willingness to be joined as a party, or comes forward to repudi-

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ate his interest in the claim, the suit must be dismissed. **Relumal Devlaram v. Chellaram Jodharam**, 1 Sind. L.R. 191.

OROUGH AND HAYWARD, JJ.

(5) *Contract Act, S. 253, Distribution of assets—Contribution to losses.*

Under S. 253 of the Contract Act, the share of each partner in the partnership property is the value of his original contribution, and partners must contribute equally to losses sustained by the partnership. In the absence of a contract to the contrary, the share of loss or profit is ascertained by dividing the total loss or profit by the number of partners. The rule laid down is, that, if the assets of the partnership will not suffice to pay the amount of capital to be credited to each partner, the deficiency is a loss of capital, and is to be borne or made good by the partners. **Nam Raj v. Gokal Chand**, 10 P.R. 1908.

REID, J.

Reference —26 C. 281, 12 A.L. (1887) 160, R.

(6) *Dormant partner—Shikmi Sharik—Notice of dissolution on retirement of dormant partner whether necessary—His liability—Contract Act, Ss. 249 and 264—Evidence Act, S 105.*

The phrase *Shikmi Sharik*, by its etymological sense, means a partner whose name is not disclosed, that is, a dormant partner. Therefore, on the retirement of a *Shikmi Sharik*, no notice of the dissolution of the partnership need be given. But he is liable to all the claims on the partnership till the date of his retirement. The onus of proving that he has retired from the partnership at a specific period lies on him, on general principles as well as under S. 105, Evidence Act. **Hashmat Ali v. Lachmi Narain**, 75 P.R. 1908=122 P.W.R. 1908.

KENSINGTON AND LAL CHAND, JJ.

Reference —77 P.R. 1900, R

(2) *Dissolution—Civ. Pro. Code, Ss. 17, 215 and 215-A—Amendment of plaint—Jurisdiction.*

K. and others sued J. and others for recovery of a debt alleged to have been advanced for working a cotton and flour mill. The plea was that, under an agreement with their father, the plaintiffs became partners in the factory to

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work which they advanced capital, their share being fixed at one-fourth of the profits and losses, and the rate of interest on their advance at 6 per cent per annum.

The Lower Court on this plea held that the plaintiffs were not entitled to sue as for recovery of a loan, but that their proper remedy was to sue for an account of the partnership. It ordered amendment of the plaint accordingly, and, after inquiry, decreed the full amount with interest.

Held, (1) that the amendment of the plaint, as being approved of by the Chief Court in appeal from that order, could not further be discussed;

(2) that S. 115-A, Civil Procedure Code, is imperative and a preliminary decree for dissolution of partnership must have been passed before the accounts could be gone into. Suit remanded on this point (a);

(3) that the suit being one arising out of contract, the agreement of partnership being written and executed at Ferozepur, and the defendants being British subjects of the Ludhiana District, subject to the law of British India, it did not matter that the factory, which was the subject-matter of the partnership, was situated in a foreign territory, and, hence, that the Ferozepur Court had jurisdiction to try the suit (b).

(5) Methods that may be applied against the party bound by the decree to furnish accounts pointed out and held also that the party may be treated as in default, if, after being allowed suitable opportunities to furnish accounts, the party fails to do so. **Jagnandan Singh v. Kishore Chand**, 100 P.W.R. 1908.

CHATTERJI, J.

References.—(a) 27 A. 374, F. and (b) 82 L.T. 427 and 11 W.R. 141, F.

(8) *Single partner's power to mortgage immoveable property of the firm—English and Indian Law—Mahomedans living as joint family—S. 251, Contract Act.*

The English doctrine that a single partner cannot mortgage the immoveable property of the firm appears to be due to the technical rule of English Law that an agent cannot execute a deed on behalf of his principal unless so authorised by deed.

In India one partner can effect a legal as well as an equitable mortgage of partnership property (a).

Partnership—(Continued).

Power to borrow is incidental to power to trade and power to pledge the business assets is incidental to power to borrow (b).

Where, therefore, some Mahomedan brothers entered into a partnership in the nature of a joint family business, the eldest brother has power as manager to mortgage the business, and the express mention of a power to mortgage certain properties in later deed would not restrict the power to sell or mortgage other properties, which may be inferred from the power to borrow given by a prior document.

S. 251, Contract Act, does not apply in the absence of any agreement between the parties restricting the partner from executing a mortgage. **T. P. Asan Kani Ravuthar v. Aru, Aru, Somasundaram Chettiar**, 4 M.L.T. 66=31 M. 206.

WALLIS AND SANKARAN NAIR, JJ.

References.—(a) 5 C. 792, F.; 4 A. 437 (459), diss. (b) 3 Ch. (1891), 432, F.

(8-a) *Dormant partner—Partner contracting on behalf of himself and a dormant partner cannot sue the contracting party after the death of the partner entering into the contract.*

If one partner enters into a contract in his own name, still, if he is acting as the agent of the firm, his co-partners will be in the position of undisclosed principals. They can be sued on the contract and may join as plaintiffs in suing.

A railway company entered into contracts with a person in the belief that he was the only person interested in them, but he had a partner unknown to the Company. After some time the person, who contracted with the Company, died, and the dormant partner claimed payment of the amount due to the firm under one of the contracts. The Company refused to pay except on a joint receipt of the plaintiff and the administrators of the deceased. The dormant partner brought a suit to recover the amount.

Held, that, the Company having contracted with the deceased partner alone, the right to claim performance rested with him during his life time, and he could have sued on the contract alone; and that the dormant partner might have joined his co-partner in suing, but that he could not sue the Company alone. **Ali Miyan Mahomedbhai v. B. B. and C. I. Ry.**, 10 Bom. L.R. 306.

MACLEOD, J.

Partnership—(Continued).

(9) *Maintainability of suit by one partner on pro-note given him by another.*

The proper remedy of one partner against the other members of the firm is ordinarily a suit for a dissolution of partnership, and one partner is not entitled to maintain a suit, other than a suit for dissolution, against the other members of the firm, in respect of the partnership transactions, on the ground that the plaintiff as a member of the firm would be a necessary defendant and that a man cannot maintain a suit against himself (a).

But this rule does not bar a suit by one member of the firm, upon a promissory note given him by two other members of the firm, in respect of an advance made by him to the firm and interest thereon (b). **Vallamkondub Subbiah v. Malupeddi Venkatramiah**, 4 M.L.T. 195 = 18 M.L.J. 347 = 31 M. 343.

WALLIS AND MUNRO, JJ.

References.—(a) 25 B. 606, *Expl.* (b) 23 M. 597, R.

(10) *Suit to recover share of profits—Art. 106, Limitation Act—Suit good as suit for contribution.*

Though a suit, instituted at the instance of a partner, as a suit for an account and a share of profits, is barred by limitation, yet, as a suit for contribution, it may be maintained, but the defendant in that case must be allowed to show if he can that, on a settlement of accounts, the amount payable by him as contribution is wiped out or reduced. **Sadhu Narayana Iyengar v. Ramasawmy Ayengar**, 4 M.L.T. 475;

MILLER AND SANKARAN NAIR, JJ.

References.—28 M. 344, F; 18 M. 134, Cons.

(11) *Provision in partnership deed regarding succession of partner's nephew on partner's death—Partnership terminable at will, and not for a term.*

Where a deed of partnership provides that, on the death of one of the partners, his nephew should act in his stead, held, that the provision did not constitute the partnership as one for a term intended to run during the life-time of the partner, but only a partnership dissoluble at will. **Souri Ayyangar v. Srinivasa Ayyangar**, 4 M.L.T. 478.

SANKARAN NAIR AND PINHEY, JJ.

References.—18 Ch. D. 863 and 7 Ir. 411, R.

(12) *Suit to enforce article in partnership deed—Suit for dissolution not necessary.*

Partnership—(Continued).

At the instance of one partner, the Court can compel the other partner to enforce a particular term of a partnership or to restrain its breach, the same being not substantially open to the same objections as enforcing the performance of a contract to carry on a partnership business. Even without bringing a suit for dissolution of partnership, such a suit for enforcing the partnership articles may be maintained. **Kari Venkataraddi v. Kollu Narasayya**, 4 M.L.T. 456.

WHITE, C.J., AND ABDUR RAHIM, J.

References.—15 M.L.J. 142; 18 M. 134; 26 C. 254, R, 39 E.R. 427 and 428, R and F, 67 E.R. 432, F, 2 M.H.C.R. 28, Cons and Diss; 2 N.W.P.H.C.R. 90, (1862-3) M.H.C.R. 341; 1 C.L.R. 545, R.

(13) *Criminal breach of trust—Dishonest conversion by partner—Liability of partner to account for partnership money.*

In a partnership, it is open to a partner to spend the money he receives and to account for it in dealing with the partnership; and such a partner is plainly entitled to be called upon for an account of the expenditure of the money which he has received.

In a case where it was not satisfactorily made out that this was not done, and it could not be made out in the absence of a proper demand for an account, it was held that no dishonest conversion could be found, which would justify the conviction of the partner under S. 406, Penal Code. **Debi Prasad Bhagat v. Nagar Mull**, 35 C. 1108.

STEPHEN AND HOLMWOOD, JJ.

(14) *Wrongful attachment of partnership property—Right of individual members to sue for damages.*

Any member of a firm, whose property has been wrongfully attached by a Court-bailiff, must necessarily suffer some damage to his business reputation, and distress of mind. He has, therefore, a right to maintain a suit for damages against the attaching creditor. **Maghanmal Rochiram v. Tikamdas Hotchand**, 2 Sind. L.R. 26.

CROUCH AND HAYWARD, A.J.CS.

(15) *Suit for settlement of partnership accounts—Realisation of partnership assets subsequent to dissolution—Limitation. See LIMITATION ACT, No. 70, 1 Sind L.R. 169.*

Partnership—(Concluded).

(16) Liability of retiring partners. See CONTRACT ACT, No. 38, 137 P.L.R. 1908.

(17) Partnership entered into at one place—Business carried on at another—Suit brought in a third place—Return of plaint, for presentation to proper Court. See CIV. PROC. CODE, No. 42, 5 A.L.J. 88.

(18) Hindu joint family firm—Liability of the firm for the act of a member pledging its credit—Question as to whether the transaction was or was not in the course of the firm's business, whether material—Negotiable instrument. See HINDU LAW (JOINT FAMILY), No. 10/11, 10 Bom. L.R. 668.

(19) Account books of the partnership—Entries in them binding on partners *inter se*—A partner can surcharge and falsify the accounts—Sleeping or dormant partner—Relation between him and the managing partner. See EVIDENCE ACT, No. 8, 10 Bom. L.R. 811.

(20) Partnership-deed entitling parties to a right to come into existence in future—Registration. See REGISTRATION ACT, No. 3, 89 P. R. 1908.

(21) Trading partnership between a son and father to the exclusion of the other members of the joint family. See HINDU LAW (JOINT FAMILY), No. 17, 2 Sind. L.R. 13.

(22) Suit dismissed owing to plaintiff's partner not being made co-plaintiff. See CIVIL PROCEDURE CODE, No. 44, 189 P.L.R. 1908.

Pasturage.

—right, grant of, independently of interest in land. See ACT VIII of 1885 (BENGAL), No. 24, 7 C.L.J. 152.

Pattah.

Transfer of pattah from tenant—Old tenant not contesting validity of transfer after notice—No petition from old tenant paying recognition of transfer—Duty of Zemindar to grant a pattah to a new tenant. See LANDLORD AND TENANT, No. 2, 3 M.L.T. 235.

Patwari.

(1) *Patwari's rates and cesses—Plaintiffs suing as assignees of Government revenue—whether they can recover.*

In a suit to recover the patwari's rates and cesses paid by the plaintiffs on behalf of the defendant, a zemindar, it was held, that they could recover the said rates and cesses in the same manner as in a suit for arrears of revenue.

Patwari—(Concluded).

and a suit for their recovery lies as a suit to recover arrears of revenue. As for those rates the persons with whom the mahal was settled incurred a joint liability, and so, the plaintiffs must be deemed to have paid them as co-sharers. *Narain Singh v. Kesho Das*, 4 A.L.J. 816 = A.W.N. (1908), 20.

GRIFFIN, J.

Pauper Suit.

(1) *Application for leave to sue as pauper, when good prima facie title to property in suit not established—Civ. Proc. Code, Ss. 407 and 409—*

In the matter of an application for leave to sue as a pauper, it was pleaded that the applicant had grossly over-stated his claim, and documents were filed which bore out this contention. Several adjournments were allowed in order that the applicant might establish a *prima facie* claim to the share in the villages in dispute but he was unable to do so.

Held, that a person, who applies for leave to sue as a pauper, must make out that he has a good subsisting *prima facie* cause of action, capable of enforcement in Court and calling for an answer. *Sheopal v. Singh Sukh karan Singh*, 11 O.C. 67.

CHANDR and GRIFFIN, J.C.S.

(2) Application for leave to appeal as pauper—Application containing no schedule of property belonging to applicant—Want of verification—effect. See CIV. PROC. CODE, No. 246, 11 O.C. 19.

(3) Plaintiff obtaining leave to sue in forma pauperis—Plaintiff partly successful—Memorandum of objection in forma pauperis. See CIV. PROC. CODE, No. 307, 4 L.B.R. 262.

(4) Suit in forma pauperis—Evidence taken for deciding limitation—Jurisdiction. See CIV. PROC. CODE, No. 247, 4 M.L.T. 302.

(5)—See FORMA PAUPERIS.

Pedigree.

(1) Presumption of correctness of genealogical table prepared at settlement—Contents of the table being vague—Effect. See CIV. PROC. CODE, No. 35, 58 P.W.R. 1908.

(2) Mode of calculating degree of relationship in the Banu District Tahsil Isa Khel. See CUSTOMS (PUNJAB), ALIENATION, No. 6, 48 P.R. 1908.

(3) Value of pedigree tables which extend beyond the seventh or eighth degree. See CUSTOMS (PUNJAB), WILL, No. 2, 11 P.R. 1908.

... interest or enhanced interest... Contract Act.

... for enhanced interest... payable prospectively... may not be a... to the circumstances of each case.

... a covenant for interest at... have to take effect retrospectively... is necessarily a penalty.

... where no unfair advantage has been taken, a debtor is not entitled to relief... in case of default the terms... are markedly less favourable... Ham Prasad, 11 C.W.N.

... 15 A. 232; 30 C.W.N. 161; 2 C.W.N. 203, R. (a) 10 M. 203, R.

... rate of interest, whether... 1, 4 M.L.T. 87.

... 1971.

...

... initial presumption in... of personal law... 140 B.L. 1906.

... meaning and... another. See... C.W.N.

... No. 17 M.L.J. 331.

(2)—to be returned for presentation... Court where appellate Court... Court has no jurisdiction to entertain... JURISDICTION (GENERAL), No. 32 P.W.R. 1006.

(3) Return of, before registration, when proper—Order returning... amendment, when made, See... (GENERAL), No. 3, 32 P.W.R. 1006.

(4) Amendment of—Finality of... order confirming order of—Revision... See CIV. PRO. CODE, No. 76, 15 P.W.R. 1006.

(5) Presentation of, by managing partner, partnership. See PARTNERSHIP, No. 1, 15 L.R. 191.

(6)—to be signed by plaintiff—Cases where signature is dispensed with, See CIV. PRO. CODE, No. 74, 4 N.L.R. 117.

(7) Suit for possession on title by plaintiff—Title not proved—Plaint not entitled to possession for more than 12 years—See POSSESSION, No. 8, 4 M.L.T. 244.

(8) Amendment of plaintiff—Plaint... time on the face of it—Leave... plaintiff so as to bring the claim... cannot be allowed—Plaint in error—Counsel's fees. See CIV. PRO. CODE, No. 76, 15 Bom. L.R. 969.

(9) Plaintiff originally... subsequent amendment owing to... defect—Suit dismissed... by appellate Court, See... Act, No. 3, 15 L.J. 493.

Plaintiff.

—means every person... another. See... 32.

Plaintiff and Client.

(1) Plaintiff... another... 32.

Pleader and Client—(Concluded)

of first instance. *Himachayala Padmanabha-du v. Nookala Rajappa*, 18 M.L.J. 188.

BIRSON AND MILLER, JJ.

Reference:—29 I.A. 79=25 M. 869.

(2) *Compromise by client*—Pleader endeavours to get the client to accept a less amount than that for which he is liable, whether "grossly improper conduct." See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), No. 1, 5 A.L.J. 126.

(2-a) *Order of High Court suspending a pleader from practice*—Leave to appeal to Privy Council. Procedure. See LETTERS PATENT, No. 1, 10 Bom. L.R. 21.

(3) *Mistake of pleader how far "sufficient cause" within the meaning of S. 5 of the Limitation Act.* See LIMITATION ACT, No. 4, U.B.R. (1907), 3rd Quarter, Limitation, 1.

(4) *Duty of Court where pleader engaged in case informs it that he has no instructions.* See CIV. PRO. CODE, No. 95, 3 M.L.T. 225.

(5) *Client's liability to suffer from consequences of the dishonesty of pleader or of his want of skill.* See CIV. PRO. CONF, No. 261, 1 Sind L.R. 160.

(6) *Pleader mentioned in vakalathnamah unable to appear owing to illness and transferring his brief to another pleader not named in vakalathnamah*—Duty of Court to hear pleader who appeared—Junior pleader instructed to argue—Duty of Court to grant adjournment. See ACT X OF 1859 (BENGAL RENT RECOVERY), No. 1, 7 C.L.J. 426.

(7) *Pleader appearing for adjournment. Adjournment refused*—Dismissal of suit—Plaintiff's remedy. See CIV. PRO. CODE, No. 86, 1 Sind L.R. 224.

(8) *Misconduct of pleader*—Disciplinary jurisdiction of High Court. See REG. II OF 1827, No. 10 Bom. L.R. 1169.

(9) *Complaint to Subordinate Judge against pleader*—Similar complaint to District Judge being sent to Subordinate Judge for enquiry and report—Sanction to pleader to prosecute for perjury—High Court's power to interfere. See CIV. PRO. CODE, No. 855, A.W.N. (1908), 273.

(10) *Notice to pleader if notice to client.* See PRACTICE, No. 17, 12 C.W.N. 142.

(11) See ACT CXXIII OF 1879 (LEGAL PRACTITIONERS).

(12) See also under ADVOCATE, COUNSEL, VAKIL.

Pleader's fees

(1) *Probate proceedings—Appeal—Assessment of pleader's fees.*

Pleader's fees in appeals in probate proceedings should, according to a long standing practice of the High Court, be assessed at Rs. 30. *Sundrabai Saheb v. The Collector of Belgaum*, 10 Bom.L.R. 1197.

CHANDAVARKAR AND HEATON, JJ.

(2) *Civil Rules of Practice or Rules applicable to Presidency Small Cause Court to be applied in calculating*—S. 27, Land Acquisition Act (1894), effect of. See ACT I OF 1894 (LAND ACQUISITION), No. 17, 31 M. 328.

(3) *Suit for a declaration that defendant was not pregnant at her husband's death*—Pleader's fee. See DECLARATORY SUIT, No. 1, 124 P.W.R. 1908.

Pleadings.

(1) *Practice—Setting up inconsistent pleas—Defence of want of genuineness of a deed—Issue upon that basis—Plea of misrepresentation, undue influence or fraud, not allowed subsequently.*

A genuine document might or might not be binding upon a party, but if the party, who has executed it intends to raise the defence that it is not binding, he ought either to raise it in his written statement, or get an issue framed on it. If a party denies the execution of a document, he cannot, strictly speaking, be allowed to raise the inconsistent defence that the document is not binding upon him (a).

Where, in a suit upon a deed, the defence is that the deed is not genuine and upon that issue the parties go to trial, it is not open to the defendant subsequently to rely on misrepresentation, undue influence or fraud as vitiating the deed. *Parag Naran v. Chodra Chatla Jakhlo*, 10 Bom. L.R. 424.

CHANDAVARKAR AND KNIGHT, JJ.

Reference:—(a) 15 I.A. 81=15 C. 684, F.

(2) *Inconsistent issues—Non-execution of promissory note and coercion.*

Suit on a promissory note. In his written statement, the defendant denied the execution of, and the consideration for, the note; and issues were raised on these contentions. Plaintiff proved the execution and the passing of consideration. Judgment was given in his favour. On appeal, defendant contended that the note was executed under coercion on the

Pleadings—(Continued).

plaintiff's own showing that, as such, the contract was voidable. *Held*, the contention as to the coercion was inconsistent with the contention as to the non-execution of the note, and was, therefore, inadmissible. The determination in a cause should be founded on a case either to be found in the pleadings, or involved in or consistent with the case thereby made. In this case, the contention as to coercion was inconsistent with the case set up in the written statement.

The contention of the defendant that, on the plaintiff's own evidence, he was not entitled to a decree, will not prevail, because the contract was not illegal or void, but only voidable, which latter contention was not raised by the defendant in his statement. *Ma Hnin Get v. S. Y. A. Satappa Chetty*, 14 Bur. L.R. 65

FOX, C.J. AND HARTNOLL, J.

References:—15 C. 684; 11 Moo. I.A. 7; 14 C. 301.

(3)—statements in—Issue of fraud—Particulars to be given. See *FRAUD*, No. 1, 10 Bom. L.R. 276.

(4) Original relief claimed in plaint to rest on facts verified by plaintiffs. See *CONTRACT ACT*, No. 12, 4 N.L.R. 86.

(5) Partition suit—Preliminary order for partition—Final decree.—In appeal both can be questioned—Practice—Pleadings. See *CIV. PRO. CODE*, No. 109, 10 Bom. L.R. 514.

(6) Party seeking to avoid contract on the ground of fraud or undue influence—Party must give in his pleadings full particulars of the circumstances on which he relies—Broad generalisations not sufficient. See *UNDUE INFLUENCE*, No. 1, 8 C.L.J. 135.

(7) Change in—Defendant limited to the pleadings set forth in written statement. See *TRANSFER OF PROPERTY ACT*, No. 81, 4 M.L.T. 327.

(8) Plaintiff not asking for declaration of his right to nominate *mohunt* of another *mutt*—Plaint not precisely stating relationship between two *mutts*—Whether plaintiff can, in appeal, ask for decree for administration and possession till new *mohunt* is appointed. See *RELIGIOUS ENDOWMENTS*, No. 7, 8 C.L.J. 499.

(9) Statement by plaintiff not admitted by defendant—Plaintiff put upon proof of his title—Effect of neglecting proof. See *TRADE MARK*, No. 2, 19 C.W.N. 32.

Pledge.

(1) Discharge of debt with proceeds of debtor's jewel on debtor's authority—Pledge—Subsequent redemption—Revival of debt. See *DEBT*, No. 1, 8 M.L.T. 293.

(2)—by pawnor, not owner but, having a right to possession, validity of—right of owner to redeem articles pawned—suit to declare. See *CONTRACT ACT (IX OF 1872)*, No. 33, A.W.N. (1908), 57.

Poggalika.

Monastery and monastery land—*Poggalika* gift of such property to *pongyi*—Dones's rights. See *SPECIFIC RELIEF ACT*, No. 10-a, 14 Bur. L.R. 277.

Police.

Police officer's power of search under S. 165, Cr. P.C.—Same as a Judicial Officer has under S. 96. See *ACT XVIII OF 1850 (PROTECTION OF JUDICIAL OFFICERS)*, No. 1, 59 P.W.R. 1908.

Ports Act.

See *ACT X OF 1889*.

Possession.

(1) Suit for possession—Failure of cause of action—Proper decree to be made in such a case—Possibility of *media concludendi* being the same in other actions gives the Court no power to pronounce upon them.

Where the plaintiffs claimed to have possession of their mother's property on the ground that she was dead, and the Court held that it was not proved that the lady was dead, the inevitable inference would seem to be that the suit should be dismissed. The mere circumstance that some of the *media concludendi* might be the same in other actions does not vest the Court with any right or duty to pronounce upon them in a suit which has gone by the board, because of the failure of the ground of action. *Musummat Waliha v. Jogeshwar Narayan*, 7 C.L.J. 44 (P.C.)=10 Bom. L.R. 9=12 C.W.N. 227=17 M.L.J. 226=2 M.L.T. 506=35 C. 189=14 Bur L.R. 101.

LORD ROBERTSON, LORD COLLINS, AND HER ARTHUR WILSON.

(2) Suit for—Onus of proof—Nature of evidence to be adduced by either party—Title, proof of, effect of—Presumption of possession—Constructive possession—Survey map, value of, as evidence.

In respect of jungle and hilly land, possession must be presumed to be with the rightful owner (a).

Possession—(Continued)

Plaintiff in an action for redemption, must not only prove his title, but also his possession, actual or constructive, within twelve years of suit. (c). When plaintiff has established his title, it is not necessary for the defendant to prove a better title, or establish that he has acquired a good title by adverse possession, which has extinguished the title of the plaintiff, but plaintiff must prove his possession also within 12 years.

Nature of evidence required in such cases discussed.

Revenue Survey Maps are evidence of title and possession (c). They are not conclusive and may be shown to be wrong, but, in the absence of evidence to the contrary, they may be properly and judicially received in evidence as correct when made.

The doctrine of constructive possession applies only in favour of the rightful owner, and must not, as a rule, be extended to the wrongdoer, whose possession must be confined to land of which he is actually in possession. (d) **Mirza Shamsah Bahadur v. Munsh Kunji Behari Lal**, 12 C.W.N. 273=3 M.L.T. 212=7 C.L.J. 114.

MOOKERJEE AND CASPERZ, JJ.

References:—(a) 9 C. 744 and 19 C. 660 (P.C.), *relied on*. (b) 12 M.L.A. 337, 8 M.L.A. 199, 9 C. 744; 16 C. 473 (P.C.) and 17 C. 137 (P.C.), *relied on*. 2 M. 30, R. (c) 30 C. 291 and 22 C. 252 (257), R. (d) 24 C. 256; 6 App. Cas. 164; 13 App. Cas. 798; 29 C. 518; 5 Peters 319; 102 U.S. 333; 134 U.S. 355; 144 U.S. 526, R.; 20 W.R. 25, R.

(3) *Suit for—Title at the date of suit—Bengal Tenancy Act (VIII of 1885), S. 167—Notice, proof of service of—Notice, validity of—Order-sheet of the proceedings, entries in, essential value of.*

In a suit for recovery of possession, the plaintiff can succeed only on the title as it stood on the date of the institution of the suit.

Until the notice has been properly served under S. 167 of the Bengal Tenancy Act upon the incumbrancer, the incumbrance subsists.

It is obligatory on the purchaser to show that the notice under S. 167 had been served in the manner prescribed. The entries in the order-sheet are not *prima facie* evidence against the incumbrancer that the notice was served (b).

Possession—(Continued)

The purchaser, who relies upon the service of notice, must prove it either by the production of the person who served the notice or by any other means recognized by law; and if a question arises as to the validity of the notice it must be shown that it was a valid notice and was signed by a competent officer as required by cl. (1) of S. 167 of the Bengal Tenancy Act (b). **Radhay Koer v. Ajodhya Das**, 7 C.L.J. 262.

MOOKERJEE AND CASPERZ, JJ.

References—(a) C.L.J. 251 (1907), F. (b) 20 C. 813, F.

(1) *—of part of a village not—of plaintiff lands.*

POSSESSION of a part of a village is not sufficient to justify a finding that the plaintiff is in possession of the land in suit though it is a part of the village. **Chhambaram Chetty v. Rama Chetty**, 3 M.L.T. 313.

BODDAM AND MUNRO, JJ.

(5) *Limitation—Possession, suit for—Mortgage purchaser—Formal possession—Period from which limitation runs—Third person in actual possession—Ouster.*

In execution of a mortgage decree, the mortgagees purchased the property under mortgage on the 7th October, 1888, and took formal possession of it on the 17th February, 1890. The plaintiff, who bought the property from the auction-purchaser, brought a suit for possession on the 20th December, 1901, against the mortgagor and his vendees, who were not parties to the mortgage suit.

Held, that the suit was barred by limitation, as the cause of action accrued when the mortgage security ceased on the 7th October, 1888, (a).

In the case of a third person who had already purchased the property and obtained actual possession, delivery of possession, as against the judgment-debtor alone, cannot amount to an ouster of the person in possession (b). **Ramjan Mahomed v. Chunder Mohan Aditya**, 7 C.L.J. 640.

CASPERZ AND SHANFUDDIN, JJ.

References:—(a) 16 W.R. 38 (P.C.), F. (b) 22 A. 269, F.; 4 C.W.N. 297, D.

(6) *—Proof of title—Presumption in favour of the man in possession.*

Possession is in itself title in the absence of proof displacing the presumption that arises

Possession—(Continued).

from possession. The man in possession starts with this presumption in his favour, and the maxim *presumptio est pro possessoribus* applies; and it is, therefore, for the other side to show, not only that the former's possession is not evidence of his title, but that the latter has a superior title. **Bhagwaning Daulatling v. The Secretary of State**, 10 Bom. L.R. 571.

RUSSELL AND BATTY, JJ.

- (7) *Suit for possession—Cause of action—Dispossession—Whether plaintiff must prove possession and dispossession within 12 years.*

The general rule of law is that, when a suit is for possession and the cause of action is dispossession, the plaintiff is bound to prove possession and dispossession within 12 years, or, in other words, the plaintiff must not only show that he has a title, but that he has a subsisting title, which he has not lost by the prescriptive sections of the Limitation Act. **Ma Pyu v. Ma Main Mu**, 14 Bur. L.R. 200

HARTNOLL, J.

- (8) *Possession on title by purchase—Specific title alleged, not proved—Title by adverse possession not being inferable from plaintiff's issue—Limitation.*

A declaration cannot be given on a title not distinctly stated in the plaint or the issues (a). In a suit for possession based on title by purchase, if the specific title alleged is not proved, and if, on reading the issue with the plaint, it cannot be said that it raises the question of title "based on 12 years' adverse possession," a declaration of the title on the strength of adverse possession for more than 12 years cannot be made. **Somasundaram Chetty v. Yadvirelu Pillai**, 4 M.L.T. 344.

MUNRO AND PINHEY, JJ.

Reference:—(a) 2 C. 418, F.

- (9)—*valid title against all except rightful owner—Possessory title, heritable and transferable.*

Possession is a valid title against any one except the rightful owner (a).

Further, such title would descend by inheritance to the heirs and is also transferable (b). **Wazir-un-Nisa Begam v. Wazir Ali**, 11 O.C. 337.

PROGOTT, A.J.C.

References:—(a) 20 C. 334; 2 O.C. 3; 9 O. C. 273, B. (b) 9 O.C. 161; 8 C. 224, R.

Possession—(Continued).

- (10) *Defence, alternative—Possession either as a tenant or for more than 12 years—Adverse possession.*

It is open to the defendants, in the first place, to plead, that the lands were comprised in their tenancy and that consequently the plaintiffs were not entitled to recover possession, and, in the second place, to assert that if the tenancy was not established, as they had held possession for more than 12 years, the right of the plaintiffs to recover possession was extinguished by the law of limitation (a).

When the case of the plaintiffs was that the defendants were tenants in respect of other lands not in dispute and that by act of trespass they came to occupy the disputed land within 12 years before suit, but it was proved that the defendants had been in occupation for more than 12 years, the title of the plaintiffs to recover possession by ejectment of the defendants was barred by limitation. The question is not one of adverse possession but of limitation (b). **Raktoo Singh v. Sudhram Ahir**, 8 C.L.J. 557.

MOOKERJEE AND CASPERSZ, JJ.

References:—(a) 21 W.R. 70 (F.B); 12 B.L.R. 274 (F.B), F. (b) 2 C.L.J. 125, F.

- (11)—*whether validates hiba bil mushaa (Gift of undivided joint property) under Mahomedan Law. See MAHOMEDAN LAW (GIFT), No. 1, A.W.N. (1908), 104*

(12) *Meaning of, in S. 55, Land Registration Act. See ACT VII OF 1876 (LAND REGISTRATION, BENGAL), No. 3, 12 C.W.N. 16=35 C. 120.*

- (13) *Partition—Mode of partition—Possession, how far to be respected. See PARTITION, No. 5, 2 P.W.R. 1908 (Rev).*

(14) *Property in possession of tenant, whether capable of physical possession. See LIMITATION ACT, No. 42, 63 P.L.R. 1908.*

(15) *Purchaser at Revenue sale of a share of an estate—Right to recover possession from person who has acquired a title by adverse possession previous to default. See ACT XI OF 1859 (REVENUE SALE LAW), No. 6, 12 C.W.N. 528.*

(16) *Suit for declaration of—by a person in possession, maintainability of. See LIMITATION ACT, No. 88, 61 P.B. 1908.*

(17) *Suit by assignee from auction-purchaser of permanent tenure to recover from landlord, whether a suit for possession—Whether special*

Possession—(Concluded).

limitation provided in S. 42 of the Chotanagpur Landlord and Tenant Act applicable to case. See ACT 1 OF 1879 (CHOTANAGPUR LANDLORD AND TENANT PROCEDURE), No. 1, 12 C.W.N. 617.

(18) Appeal from suit for—whether, allowable. See CONTRACT ACT, No. 4, 51 P.R. 1908

(19) Cause of action being dispossession—Plaintiff bound to prove possession and dispossession within twelve years. See EJECTMENT, No. 6, 14 Bur. L.R. 156.

(20) Suit for possession of share in revenue-paying estate—Court-fee on plaint—'Definite share' whether must be separately assessed with revenue also. See COURT FEES ACT, No. 10, 12 C.W.N. 990.

(21) Suit for, of land—Valuation of suit to be based upon plaintiff's case only. See ACT XVIII OF 1884 (PUNJAB COURTS) No. 3 b 199 P.L.R. 1908.

Power of appointment.

Right of Hindu testator to grant, to a person named in his will—Person appointed, qualifications necessary. See HINDU LAW (WILLS), No. 10, 11 O.C. 271.

Power of attorney.

—to recover rents and profits of immovable property, whether created a charge on it—not stamped with stamp required for document creating equitable charge—non-compliance with provisions of Registration Act—Immovable property not affected. See REGISTRATION ACT, No. 12, 7 C.L.J. 149.

Practice.

(1) Judgment based on an erroneous assumption—Court's power to re-open it—Consent—Grant of revenue of a village—Grantee can bring under cultivation, uncultivated or unassessed land and profit by it.

Where a judgment is based upon an assumption or hypothesis which is ascertained to be erroneous, the Court can disregard it and re-open that portion of the case affected by the error.

Where the Government grants the revenue of a village considered as a unit of assessment, and in the course of time, the grantee is able to bring under cultivation land which was previously uncultivated or even unassessed, it is open to him under the grant to do so and to

Practice—(Continued).

profit by the new cultivation. **Balwant R. Natu v. Secretary of State**, 10 Bom. L.R. 581=32 B. 432.

JENKINS, C.J. AND BATCHELOR, J.

(2) Decree—No specific direction as to accounts in the decree—Court cannot direct accounts to be taken before Commissioner when parties have arrived at an agreement after the decree—Appeal against order of a Judge, when lies.

A decree of the High Court on the original side contemplated an account being taken between the parties, but it was silent on the question as to how that account was taken, whether by the Commissioner of the Court or by some person selected by both the parties.

The Court of first instance decided that where a direction as to account ought to have been incorporated in a decree when passed, it was competent to the Court at any stage of the proceedings to direct necessary inquiries or accounts to be made or taken.

Held, on appeal, that as some account was taken under the decree by a person appointed jointly by the parties, a new agreement had come into existence superseding the decree, and the Court was not competent to make the order appealed against.

An appeal lies against an order of a Judge sitting on the original side, if that order decides a question of some right between the parties. **Sir Jehangir Cawasji Jehangir v. The Hope Mills, Ltd.**, 10 Bom. L.R. 448.

CHANDAVARKAR AND BATCHELOR, JJ.

(3) Proceedings on Sunday, whether void—Lord's Day Act—Application to India.

A Munsif went on an inspection on Sunday. While there the parties entered into a compromise which was recorded by him and a decree passed on the spot. Held, that the proceedings of the Munsif were not vitiated by the fact that they were taken on a Sunday. Lord's Day Act does not apply to India (a) **Sheoram Tiwari v. Thakur Prasad**, 5 A.L.J. 106=A.W.N. (1908), 43=3 M.L.T. 211=30 A. 135.

STANLEY, C.J. AND BURKITT, J.

Reference.—(a) 7 M.H.C.R. 285, II.

(4) Advocates, right of, to appear and plead when instructed by vakils—Rules of the original side of the Madras High Court—Rule 533.

Practice—(Continued).

When a party, in England, appears in person, he has a right to be heard by counsel if he can get one, although such counsel is not instructed by an attorney. The same principle applies where a client does not act in person but through a *vakil*, a class of practitioners unknown in England (a). There is no rule of law which prevents a party acting by a *vakil* from being heard by counsel, that is to say, by an advocate appearing for him. **K. Mungiah Chetty v. K. Ramiah Chetty** 3 M.L.T. 322

WALLIS, J.

Reference — a) **Bennett v. Hale**, 15 Q.B.D. 171

(5) *Right to begin—Defendants supporting plaintiff must begin before defendants opposing him—Plaintiff, meaning of—Civ. Pro. Code (Act XIV of 1882), Ss. 26, 179, 180—Judicature Act (1873), S. 100.*

If some of the defendants in a suit support wholly or partly the plaintiff's case, they must address the Court and call their evidence before the defendants, really opposed to the plaintiff's case, commence their case.

The word 'plaintiff' means every person asking relief against another person. **Haji Bibi v. H.H. Sir Sultan Mahomed Shah**, 10 Bom. L.R. 327.

RUSSELL, J.

(6) *Decisions by single Judges have far binding on their successors.*

A Judge sitting on the Original Side of the High Court is ordinarily bound to follow the judgment of another Judge when the latter has decided a question of law, or laid down certain principles of practice or procedure, or judicially construed any provision of the law prevailing in the country; but the former is not bound to follow the latter's findings of facts based on the evidence recorded by him, when the evidence that may be available before the Judge in a later case may be fuller and more reliable and may tend to lead him to a different conclusion (a). **Jamshed K. Tarachand v. Soonabai**, 10 Bom. L.R. 417.

DAVAR, J.

References.—(a) 11 B. 441, 20 B. 511, not F.

(7) *Two suits between same parties by two Courts under jurisdiction of two different High Courts—Power of High Court to order stay of proceedings in one Court—Civ. Pro. Code (Act XIV of 1882), Ss. 20 and 24.*

Practice—(Continued).

Where two suits were pending in two Courts under the jurisdiction of two different High Courts, in which the parties were the same and a portion of the subject matter of the one was included in the other, it was held that the High Court under the conjoint operation of Ss. 20 and 24 of Civ. Pro. Code could determine that the proceedings in one Court should be stayed pending trial in the other. **Venkatasa Brod v. Maksundan Das**, 35 C. 541.

MACLEAN, C. J., AND CONN, J.

(8) *Appellate Court directing further evidence to be taken by original Court—No date to be fixed for further hearing.*

When an appellate Court passes an order directing further evidence to be taken by the lower Court and to send it up when taken to the appellate Court, it is wrong for such appellate Court to fix a date for further hearing in the appellate Court until the record is returned from the lower Court. **Asamuiddin Kari v. Karim Shukoor**, 1 L.B.R. 239

IRWIN, J.

(9) *Order of remand—Appeal from, after decree in suit—Civ. Pro. Code, Ss. 562, 586, 591—Pre-emption—Wajib-ul-arz—Arzidari land—Haqiat—Hussadar—Deh*

An appeal lies from an order of remand passed under S. 562, Civ. Pro. Code, even though before the filing of the appeal, the suit has been decided in compliance with the order of remand.

Arzidaris in District Barh are not members of the co-partnership body in a village. A custom of pre-emption, recorded in a *Wajib-ul-arz*, in respect of the transfer of a *haqiat* by a *hussadar* applies only to co-partners, and no claim can be maintained in respect of the sale of *arzidari* land. **Uman Kuari v. Jarbandhan Pathak**, 5 A.L.J. 447 (F.B.)—A.W.N. (1908), 195= 4 M.L.T. 162.

BANERJI, AIRMAN AND KALAWAT HUSAIN, JJ.

References — (a) 12 A. 510 (F.B.); 12 O. 436; 3 A.L.J.R. 40, F, and 29 A. 659, overruled.

(10) *Allegations—Decision on these allegations—New case in appeal not allowed.*

A litigating party can only succeed *secundum allegata et probata*, and the Courts should check the tendency of defeated litigants to evade their defeat by devising a new case, which was never set up when it should have been set up. It is, therefore, not open to a Court of appeal, to

Practice—(Continued).

expose a party, after he has obtained his decree, to the brunt of a new attack, of which he had never had any notice during the hearing of the suit. **Nathu Piraji Mezwadi v. Umedmal Gadmal**, 10 Bom. L.R. 768.

BACHELOR AND CHAURAL, JJ.

- (11) *Two Judges hearing an appeal and differing in their opinions—Whether appeal should be dismissed—Civ. Pro. Code, S. 575.*

The two Judges before whom these appeals were heard differed in their opinions. One considered that the accident was due to the negligence of the defendants' servants, the other was of opinion that the facts showed that the defendants were not guilty of negligence.

Therefore, under S. 575 of the Civil Procedure Code, both the appeals must be dismissed, each party to pay his or her own costs. **Meerama v. Babu Bhikaraj Sagarmull**, 11 Bur. L.R. 257.

IRWIN, O.C.J., AND ORMOND, J.

- (12) *Civ. Pro. Code, S. 244—Where reliefs claimed in plaint could not be asked for in separate suit—Whether plaint can be treated as execution petition.*

Where it appeared that the reliefs claimed in the plaint could not, under S. 244, Civ. Pro. Code, be asked for in a separate suit, it was held that it was competent to the Court to treat the plaint as an execution petition. **T. R. Ganesha Rao v. T. V. Tuljaram Rao**, 4 M.L.J. 288.

WALLIS, J.

- (13) *Remand to Lower Appellate Court—Appellant not entitled to notice—Date of hearing on remand—Change of settled practice.*

Where the High Court, on hearing a second appeal, remanded a case to the Lower Appellate Court for a fresh decision, the appellant in the latter Court is not entitled to a notice intimating the date on which the case will be taken up (a).

A settled practice cannot well be disturbed, unless it is shown to be illegal (b).

The position brought about by a remand to a Court of first appeal resembles that in O.X.L.J. 12 (= S. 552 of Act XIV of 1882) rather than what is reached by successive adjournments after the date originally fixed for hearing.

Once the appeal has been admitted and registered, the date of hearing may be fixed at once or after an interval; but, in either case,

Practice—(Continued).

the appellant is not entitled to receive individual notice of that date. **Atmaram v. Krishna**, 4 N.L.R. 166.

DRAKE-BROCKMAN, J.C.

- References.*—(a) 2 C.W.N. 322, R. (b) Broom's Legal Maxims, p. 518 (7th Edn.); 6 C. 598 (597); 12 A. 120 (135); 84 C. 1037 (1058); 2 C.P.L.R. 32; 17 W.R. 70; 21 W.R. 65, 2; 5 W.R. Mis. Appeals 22, D.

- (14) *Special Commissioner—Power to sell—Vesting the property in the Special Commissioner—Procedure.*

The Court has no power or jurisdiction whatever—ipso facto or conferred—first, to appoint a Special Commissioner for sale of immoveable property, secondly, to vest immoveable property in a Special Commissioner; and, lastly, to empower any such Special Commissioner to execute a conveyance of such property. **Anand Rao Bhai v. Sitabai**, 10 Bom. L.R. 1176.

DAYAR, J.

- (15) *Administration suit—Suit by heirs of the deceased—Subsequent administration suit by a creditor—Conduct of the suit.*

The heirs of a deceased person filed an administration suit with regard to his property. Subsequently, one of the creditors of the deceased filed another administration suit respecting the same estate. It appeared that the creditor's claim was just. The defendants, the heirs, contended that the creditor ought not to be allowed to obtain an administration decree and have the subsequent conduct of the proceedings.—

Held, that the plaintiff was entitled to an administration decree, but the conduct of the suit should be entrusted to the heirs of the deceased. **Ahmed Abdulla Bezaad v. Mahomed Shaikh Essa**, 10 Bom. L.R. 1166.

BEAMAN, J.

- (16) *Costs—Withdrawal of appeal—Memorandum of objections—Right of respondent to costs on memorandum.*

Quære.—Whether, when an appeal is withdrawn by an appellant, the memorandum of objections filed by the respondent under S. 561, C.P.O., cannot be heard (a).

But the Appellate Court has jurisdiction over the question of costs of the memorandum; and the proper order to make, in the absence

Practice—(Continued).

of any agreement between the parties, would be to direct the appellant to pay the respondent the costs of the appeal as well as the memorandum of objections. **Ponnasawmy Nadar v. Somasundaram Chettiar**, 4 M.L.T. 482.

WHITEN, C.J., AND MILLER, J.

Reference:—(a) 17 A. 518, R.

(17) *Notice on pleader of notice to client—Appeal from preliminary decree, disposed of—Arrival of records in Lower Court Parties how to be notified.*

An appeal preferred to the High Court against a preliminary decree for accounts having been dismissed for non-prosecution, the record was returned to the Lower Court, which directed notices to be served on the pleaders of the parties for the further hearing of the case, a week hence. Notice was served on the defendant's pleader, but he did not inform the defendant.

Held, that the notice was not a good notice on the defendant, and an *ex parte* decree passed against the defendant on the date fixed should be set aside; that the case should be reheard upon notice served on the defendant personally. **E. F. Sandys v. Upendra Chandra Sinha Roy**, 13 C.W.N. 142.

STEPHEN AND HOLMWOOD, JJ

(18) *Pleadings—Declaration of title based on adverse possession—Claim based on adverse possession not set up in the plaint*

A decree declaring the plaintiff's title to immovable property, such title being based upon adverse possession, ought not to be given to a plaintiff unless such a title is clearly set up in the plaint. **Zaki-ud-din v. Nazar Muhammad**, A.W.N. (1908), 277

KARAMAT HUSAIN, J.

Reference:—2 C. 418, L.

(19) Plaintiff all along fighting to recover land without any payment—Whether could be allowed to amend the claim to one for redemption. See **LIMITATION**, No. 6, 60 P.W.R. 1908.

(20) Leave to revoke submission to arbitration—Motion to be in Court—Stating a case by arbitrators to Court for opinion—Questions as to admissibility of evidence should be decided in their very inception. See **ACT IX OF 1899 (ARBITRATION)**, No. 2, 10 Bom. L.R. 351.

(21) Bar of limitation—Ground to get over this bar may be changed subsequently—Civ.

Practice—(Continued).

Pro. Code, S. 50. See **LIMITATION**, No. 5, 10 Bom. L.R. 346.

(22) Suit to redeem mortgage against two parties claiming mortgage-money—Interpleader suit—Plaint containing claim for redemption—Appropriate relief. See **INTERPLEADER SUIT**, No. 1, 10 Bom. L.R. 314.

(23) Amendment of decree by way of amplification of its wording—Affirmation—Insufficient time given to produce evidence—whether substantive question of law. See **APPEAL TO PRIVY COUNCIL**, No. 1, 62 P.W.R. 1908.

(24) Plaintiff to succeed on the strength of his own title and not on the weakness of the defendant. See **LIMITATION**, No. 2, 63 P.W.R. 1908.

(25) Dismissal of suit under S. 97, Civ. Pro. Code, for not paying process-fee—S. 97, C.P.C., applies only to first hearing—Course to be adopted after plaint is returned for amendment—Chief Court's power of revision. See **CIV. PRO. CODE**, No. 83 65 P.W.R. 1908.

(26) Amendment of plaint in further appeal, whether allowable and when. See **VENDOR AND VENUEE**, No. 1, 64 P.W.R. 1908.

(27) Suit set down for an *ex parte* decree before the date fixed in the summons for the hearing of the suit. See **JEN PARTI DECREE**, No. 1, 10 Bom. L.R. 901

(28) Document not mentioned in the plaint—Inspection by defendant before filing written statement. See **CIV. PRO. CODE**, No. 77 9 Bom. L.R. 1084—32 B. 152.

(29) Pleadings not set up in the lower Court—Right to set up in the Chief Courts on appeal. See **HINDI LAW (ADOPTION)**, No. 2, 53 P.W.R. 1908

(30)—when framing an issue on the point of fraud, is to set forth in the issue itself a brief statement of the fraud alleged. See **FRAUD**, No. 1, 10 Bom. L.R. 276.

(31) Divergence between decree and judgment—Power of executing Court—Decree-holder to be directed to apply for amendment of decree to the Court that passed the decree. See **DECREE**, No. 4, 60 P.W.R. 1908.

(32) Cause of action shown to exist against defendant originally impleaded—Allegations in plaint pointing also to another person concerned.

Practice—(Continued).

in the suit—Duty of Court under S. 32, C.P.C. See ACT XVIII OF 1850 (PROTECTION OF JUDICIAL OFFICERS), No. 1, 59 P.W.R. 1908.

(33) New case set up in the Chief Courts on appeal—Whether allowable. See CIV. PRO. CODE, No. 35, 58 P.W.R. 1908.

(34) Procedure for obtaining order of adjudication in insolvency—Rule or petition. See INSOLVENCY ACT (11 AND 12, VIC. C. 12), No. 2, 12 C.W.N. 538.

(35) Ground of appeal taken in lower appellate Court not argued there—Whether bars its being taken in second appeal. See APPEAL (SECOND APPEAL), No. 2, 3 M.L.T. 293.

(36) Defendant not objecting to the admission of secondary evidence at the time of filing—Right to raise the objection in argument. See EVIDENCE, No. 1, 3 M.L.T. 297.

(37) Return of defective plaint for amendment, when made. See MORTGAGE (GENERAL), No. 6, 32 P.W.R. 1908.

(38)—where successor of a Judge has to decide case already decided in part by his predecessor—Question already decided not to be re-opened except where error is obvious or patent—Such re-opening, though not illegal, is undesirable. See MORTGAGE (REDEMPTION), No. 3, 41 P.L.R. 1908.

(39)—of Privy Council—Point not taken before either of the lower Courts, whether can be taken before Privy Council. See MORTGAGE (REDEMPTION), No. 4, 10 Bom. L.R. 126 (P.C.)

(40) Suit for accounts from executor—Application to take accounts on the footing of wilful default—Practice as to making the application. See EXECUTOR, No. 1, 10 Bom. L.R. 117.

(41) Further appeal not competent—whether it can be treated as a petition for revision—Punjab Courts Act, S. 70 (b) See LIMITATION ACT, No. 67, 5 P.W.R. 1908.

(42) Suit instituted without next friend—Whether can be dismissed—Proper procedure. See GUARDIAN AND MINOR, No. 4, 11 O.C. 153.

(43) Delay due to official oversight, whether affects rights of decree-holder—Appeal treated as revision. See PRESCRIPTION, No. 1, 11 O.C. 144.

(44) Desirability of acting under S. 622 of the Civ. Pro. Code where other remedies are available. See CIV. PRO. CODE, No. 359-c, 1 Sind L.R. 226.

Practice—(Continued).

(45) Change in substantive law during progress of a suit—Law applicable to the suit. See CIV. PRO. CODE, No. 232, 10 Bom. L.R. 625.

(46)—of allowing defendant to be examined as a witness for plaintiff, propriety of. See RES JUDICATA, No. 7, 116 P.W.R. 1908.

(47) Questions as to liability of defendant to compensate plaintiff and as to amount of damages—First Court holding plaintiff not entitled to damages and dismissing suit—Court of Appeal holding plaintiff entitled to damages and remanding suit for ascertainment of damages—Practice. See CIV. PRO. CODE, No. 315, 8 C.L.J. 159.

(48) Party seeking to avoid contract on the ground of fraud or undue influence—Party must give in his pleadings full particulars of the circumstances on which he relies—Broad generalisations not sufficient. See UNDOING INFLUENCE, No. 1, 8 C.L.J. 135.

(49) Whether it is open to High Court in second appeal to dispose of the case on the ground of non-registration of a document when the point was not discussed in the lower Courts. See REGISTRATION ACT, No. 15, 4 M.L.T. 79.

(50) Defendants bound to describe the documents for which they claim privilege, sufficiently for the purpose of identification, to enable the Court to order their production, should the Court think right to do so. See EVIDENCE, No. 3, 10 Bom. L.R. 796.

(51) Where the facts in a petition to High Court appears sufficiently from the judgment of lower Courts, no affidavit need be filed. See CIV. PRO. CODE, No. 28, 8 C.L.J. 308.

(52) It is open to the appellant, on appeal from final decree, to take objection to the order passed on the application for review. See CIV. PRO. CODE, No. 79, 8 C.L.J. 294.

(53) It is open to defendant to set up alternative defences—Plaintiff not allowed to raise objection as to defendant's setting up alternative defences at appellate stage of the suit. See EASEMENT, No. 6, 8 C.L.J. 289.

(54)—of Calcutta High Court as to service of petition on respondent governed by what prevails in English Matrimonial Courts. See ACT IV OF 1869 (INDIAN DIVORCE), No. 2, 12 C.W.N. 1009.

(55)—obtaining in the original side of the High Court of Calcutta—Taxation of bills of solicitors deemed to be optional with client, and

Practice—(Concluded).

bills of costs are often adjusted without taxation. See Civ. Pro. Code, No. 1, 12 C.W.N. 1102.

(56) Power of Court to extend time for giving security—S. 602, C.P.C. (1882)—Appeal. See Civ. Pro. Code, No. 348, 87 P.R. 1908.

(57) Third party notice—Application to be before filing written statement. See High Court Rules (Bombay), No. 5, 10 Bom. L.R. 1021.

(58) Plaintiff present in Court, though counsel is absent when the case is called on for hearing—Inapplicability of Ss. 102 and 103, C.P.C., 1882—Practice. See Civ. Pro. Code, No. 85, 10 Bom. L.R. 1172.

Pre-emption.

(1) *Pre-emption—Gazetted holiday, period fixed for payment expiring on—Delay due to official oversight—Question of compliance with the decree, right of appeal—Power of Court to extend period of payment—Appeal treated as revision—Civ. Pro. Code, Ss. 214, 244 and 622.*

Held, that, where the last day of the period fixed for payment into Court of the pre-emptive price expired on a Gazetted holiday, the payment could be made when the Court opened (a).

Held, further, that the rights of a decree-holder are not affected by a delay arising from official oversight.

Held, also, that a question of payment or non-payment of pre-emptive price in compliance with a decree in the terms of S 214 Civ. Pro. Code, is not a question of execution open to appeal under S 244 of the Code (b).

Held, also, that a High Court in revision has the power vested in a Court of appeal, to fix a fresh date for the deposit of the purchase-money (c).

The Court in this case, treated the appeal before it as an application for revision, set aside the decree of the District Judge as without jurisdiction and substituted a similar order in the exercise of its revisional powers. **Ganga Dhar v. Agrudh Singh**, 11 O.C. 144.

GRIFFIN, J.C.

References:—(a) 2 N.W.P. 112 and 3 A. 850, 1b: (b) 4 A. 420, R; and (c) 2 A. 744 and 13 A. 376, R.

(2) *Plea that a sale was in reality a gift—Estoppel, belief in the representation necessary for.*

Pre-emption—(Continued).

Where it was contended that the parties to a sale-deed were estopped from proving as against the person suing for pre-emption, that the transaction was in reality different from what it appeared to be, *held*, that before the plea of estoppel could be maintained it must be proved that the plaintiff believed the representation and brought his suit in consequence of that belief (a). **Nawab Begam v. Hamid Ali**, 11 O.C. 176.

CHAMBER AND EVANS, J.Cs.

References:—(a) S.C.A. No. 340 of 1904, 1 O.C. 75 and 20 C. 296, R.

(3) *Wajib-ul-arz—Construction of documents—Muhammadian law.*

The pre-emptive clauses of a *wajib-ul-arz* contained the following provision:—“The *zamindar* of the *khalsa* is one person, hence there is no custom of pre-emption in the *khalsa*; but among the owners of the *khalsa* and *mulks* the following customs of pre-emption obtain.” The *khalsa* subsequently came to have more owners than one. *Held* that no right of pre-emption was given by this *wajib-ul-arz* to the owners of the *khalsa* *inter se*, but that a sale of a share in the *khalsa* was subject to the Muhammadian law of pre-emption and this irrespective of the fact that the vendee was a Hindu. **Ram Lal v. Bahadur Ali**, A.W.N. (1908), 153=80 A. 372=5 A.L.J. 414.

STANLEY, C.J. AND KARAMAT HUSAIN, J.

References: 7 A. 775, 22 A. 102 and 11 A. 466, R.

(4) *Wajib-ul-arz—Construction—Shurkay-an-i-shiknu—meaning of.*

Where the *Wajib-ul-arz* of a village gave a right of pre-emption first to *shurkay-an-i-shiknu*, then to *shuhayan-ek-jadd* and lastly to *khewatdaran*, *held* that *shurkay-an-i-shiknu* was intended to denote relatives by blood and not co-sharers in any sub-division of the mahal. **Bahal Singh v. Mubarak-un-Nissa**, 5 A.L.J. 52=A.W.N. (1908), 16=80 A. 77.

STANLEY, C.J. AND BURKITT, J.

References:—Agra Full Bench Rulings 171, R; 23 A. 260, D.

(5) *Wajib-ul-arz—Interpretation of—intiqal—Conditional sale.*

A *wajib-ul-arz* recording a custom of pre-emption gave a right of pre-emption in case of any *Intiqal* of property in the village. *Held*,

Pre-emption—(Continued).

that a suit for pre-emption in case of a conditional sale was maintainable. **Ram Narain v. Ganga Ram**, 4 A.L.J. 814 = A.W.N. (1908) 19.

RICHARDS, J.

(6) *Mortgage—unregistered deed—Sale of property hypothecated—Purchaser having notice of the mortgage—Property pre-empted by the defendant—Whether notice to pre-emptor necessary.*

A right of pre-emption is not a right of re-purchase, but is simply a right entitling the pre-emptor to be substituted for the vendee as purchaser, and to stand in his shoes in respect of all the rights, and obligations arising from the sale under which he derives his title. He can only get what the vendee bargained for.

S. 50 of the Registration Act (III of 1877) does not protect a purchaser who purchased with knowledge of an unregistered encumbrance.

Where, therefore, a vendee purchases with notice of a prior unregistered encumbrance and the property is pre-empted the pre-emptor takes subject to that mortgage even if the existence of that mortgage was concealed from him. **Tejpal v. Girdhari Lal**, 5 A.L.J. 112 A.W.N. (1908), 42 = 8 M.L.T. 223 = 30 A. 130.

STANLEY, C.J. AND BURKITT, J.

(7) *Wajib-ul-arz—One mahal—Perfect partition—Custom—Contract*

Mauza Barauli was sub-divided by perfect partition into three mahals; Mahal Ali Mazhar, Mahal Bhairon Pershad, Mahal Sheo Dial Ram. Before partition the *wajib-ul-arz* of the Mauza provided that a right of pre-emption existed in the following order—first to sharers descended from a common ancestor, then to co-sharers in the village, then to strangers. At the time of partition, three *wajib-ul-arz* were prepared for the three mahals. The *wajib-ul-arz* for the mahals Ali Mazhar and Bhairon Pershad, which mahals had a sole proprietor, reproduced the wording of the *wajib-ul-arz* of the undivided village, in a chapter, the heading of which referred to the rights of sharers in the mahal. In the third mahal, which had numerous sharers, the wording of the original *wajib-ul-arz* was modified, and it was provided that a right of pre-emption in case of a transfer by a *partidar* would exist in the following order: first co-sharers descended from a common ancestor, then *partidars*, then strangers. On sale of Mahal Ali Mazhar the

Pre-emption—(Continued)

proprietor of Mahal Bhairon Pershad sued for pre-emption, basing his claim on the *wajib-ul-arz*. *Held*, that the preparation of new *wajib-ul-arz*s for three mahals abrogated the old custom of pre-emption, and that the fact that the sole proprietors of Mahals Ali Mazhar and Bhairon Pershad had caused to be made an entry in the *wajib-ul-arz* relating to the right of pre-emption in those mahals did not give these proprietors any authority to control their own rights or the rights of their successors over the property. The *Wajib-ul-arz* did not prove the existence of a custom of pre-emption in the mahals in question. **B. E. O'Connor v. Raj Bhadur**, 5 A.L.J. 79.

STANLEY, C.J. AND BURKITT, J.

References.—15 O. 20 = 4 I.A. 427; (1898) A.W.N. 89; 15 A. 147, 27 A. 602, II.

(8) *Perpetual lease, no suit for pre-emption in case of—lease not a sale—Oudh Laws Act, S. 9.*

Held, that no right of pre-emption can be claimed in respect of a perpetual lease, as such a lease is not a sale within the meaning of Oudh Laws Act. **Babu Baldeo Prasad v. Sheikh Ali Husain**, 13 O.C. 348.

CHAMBERLAIN, J.C. AND GRIFFIN, A.J.C.

Reference.—8 O.C. 21, D.

(9) *Custom—Waiver—Pre-emptor receiving from the vendee mortgage-money due to him.*

Held, that a pre-emptor cannot be deemed to have waived his right of pre-emption by simply receiving from the vendee mortgage-money due to him on the security of the property subject of the sale. **Fazal Dad Khan v. Sawan Singh**, 39 P.L.R. 1908 = 30 P.W.R. 1908 = 37 P.R. 1908.

JOHNSTONE AND KENSINGTON, JJ.

References.—138 P.R. 1886; 164 P.L.R. 1906; 2 A.L.J. 145 (1905); 9 A. 234; 32 P.R. 1884, II.

(10) *Price to be paid in pre-emption suit—Market value—Good faith.*

Before a Court proceeds to assess market value in pre-emption cases and to call upon a plaintiff to pay that, it must satisfy itself that the price stated in the deed was not fixed in good faith. But, where the debt is genuine, though most of it is made up of interest, and the land, which is the subject of the suit, is not the vendor's only asset, and he is not insolvent, and there has been a sort of adjustment of value, in a manner to suit vendor and

Pre-emption—(Continued).

vendee, and not a wholesale wiping out of all vendor's liability to vendee, there is no presumption as to the bona fith of the price fixed. **Ajadhia Pershad v. Abbasullah**, 56 P.R. 1907 = 91 P.W.R. 1907 = 58 P.L.R. 1908.

JOHNSTONE AND RATTIGAN, JJ.

References.—75 P.R. 1901; 68 P.R. 1902, F; 77 P.R. 1901, D.

- (11) *Personal covenant for title by vendor in favour of vendee—Right of pre-emptor to enforce the covenant.*

A condition in a deed of sale, in which the vendor guarantees his title in the land, solely to the original vendee, and in which he agrees to compensate the vendee if disturbed, is purely a personal covenant by the vendor in favour of the vendee, and does not, therefore, entitle for the benefit of the pre-emptor who succeeds in obtaining a decree for possession by pre-emption. **Sandhe Khan v. Bhana**, 141 P.R. 1907 = 93 P.W.R. 1907 = 57 P.L.R. 1908.

ROBERTSON AND LAL CHAND, JJ.

References.—30 P.R. 1893; 55 P.R. 1899; 41 P.R. 1902; 24 P.R. 1901; 93 P.R. 1902, 96 P.R. 1906; 8 A. 775; 8 A. 86, 3 A. 688, R.

- (12) *Sale of agricultural land prior to 11th May, 1905—Right of vendee superior under the old Act but inferior under the new Act of pre-emption—Priorities under both Acts—Act IV of 1872, Ss. 12 and 14—Act II of 1905, Ss. 2, 3, 4, 11, 12 and 18—General Clauses Act I of 1898, S. 4 (c).*

On the 12th December, 1904, vendor, a Mahajan, and not agriculturist, sold his half share in a joint *khata* to his first cousin. The new Pre-emption Act II of 1905 came into force on 11th May, 1905. The pre-emption suit was instituted on the 16th March, 1906.

Held, by a majority of two Judges of the Full Bench of three, that the priorities given by S. 12 of the Punjab Pre-emption Act II of 1905 are applicable to a claim to the right of pre-emption with reference to a sale executed before the commencement of the Act (a).

Held, also, that where the vendee had a superior right of pre-emption under the Punjab Laws Act, IV of 1872, to the pre-emptor, the saving clause of S. 3 (3) of Act II of 1905 protects him against that pre-emptor who has superior rights under the Act of 1905. **Sarta v.**

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Fakh Chand, 18 P.W.R. 1906 (F.B.) = 17 P.R. 1906 = 133 P.L.R. 1906.

CLARK, C.J., REID AND JOHNSTONE, JJ.

References.—a) 22 P.R. 1906; 80 P.R. 1907, F; 95 P.R. 1901; 32 P.R. 1902, 44 P.R. 1903 and 87 P.R. 1906; 7 A. 585 (F.B.), and 21 A. 374, R.

- (13) *Vendee assigning the property before suit for pre-emption—Transferees not made parties—Fresh suit against transferees—Limitation Act, Art. 10—Applicability.*

A pre-emptor instituted a suit against the vendor and vendee for pre-emption and obtained a decree. Before the suit, the land had been assigned by the vendee to certain persons. Held, that the pre-emptor, in order to bind the transferees, should have impleaded them in the previous suit, or should institute a fresh suit. Such a suit against the transferees would be a pre-emption suit and should be brought within the period of limitation prescribed in Art. 10 of the Limitation Act. **Rausan v. Makhan**, 106 P.R. 1907 = 75 P.L.R. 1908.

JOHNSTONE, J.

References.—25 P.R. 1903; 93 P.R. 1902 and 46 P.R. 1902, W.

- (14) *Purchaser having equal right to pre-empt with plaintiff joining in purchase with one having inferior right—Plaintiff's right of pre-emption.*

Where a purchaser of land and houses, who has equal right of pre-emption with that of the plaintiff, joins with himself in the purchase a person who has an inferior right, the plaintiff is entitled to take over the whole bargain, the sale being one and indivisible. **Achhru v. Labhu**, 48 P.R. 1907 = 81 P.L.R. 1908 = 107 P.W.R. 1907 (Sup.).

CHATTERJI AND JOHNSTONE, JJ.

References.—10 P.R. 1884; 94 P.R. 1895; 46 P.R. 1896, F; 19 A. 148 (F.B.), Diss.

- (15) *Suit for—Limitation in suits based on foreclosure—Order absolute, time to begin from—Suits for pre-emption based on a foreclosure decree passed on a compromise, maintainability of—Oudh Laws Act, 1876, Chapter II—Limitation Act, 1877, Sch. II, Art. 120—Transfer of Property Act, Ss. 86, 87 and 93.*

Held, that pre-emption could be claimed in the case of a decree for foreclosure passed on a

Pre-emption—(Continued).

compromise, made in a suit, brought for sale of the mortgaged property on the basis of a simple mortgage.

Held, further, that the limitation for a pre-emption suit brought on the basis of foreclosure decree is to be reckoned from the date when the decree is made absolute. **Arjun Singh v. Pandit Iqbal Narain**, 10 O.C. 374.

CHAMBER AND SANDERS, J. CS.

References.—(a) 14 A. 405, 24 A 17 (P.C.), R.

(16) *Cause of action accruing in father's life-time—Son's right to claim on death of father—Voluntary transfers—Right of pre-emption over property previously sold.*

A right to sue for pre-emption, which had accrued to a person in his life-time, passes, at his death, to his successors, on their inheriting his land. But a voluntary transfer will not pass a right of pre-emption as regards property previously sold. **Faqir Ali Shah v. Ram Kishan**, 133 P.R. 1907 (F.B.) = 84 P.W.R. 1907 = 88 P.L.R. 1908.

CLARK, C.J., ROBERTSON AND SHAH DIN, JJ.

References.—49 P.R. 1901, 95 P.R. 1901, 7 A. 535, R.

(17) *Wajib-ul-arz, construction of*

A village *wajib-ul-arz* provided that, in the case of a sale by a co-sharer, the first right of pre-emption would be in the uterine brother of the vendor, and the next class of pre-emptors would be co-sharers in the village; but the same *wajib-ul-arz* further provided that a Hindu widow succeeding to her husband in the absence of male issue would have full powers of sale, but would not be competent to sell to her brother or father. *Held* that the brother of a Hindu widow could not as vendee from his sister resist a claim for pre-emption brought by co-sharers in the village. **Kam Niwaz v. Dakho**, A.W.N. (1908), 59.

BANERJI AND RICHARDS, JJ

(18) *Suit for pre-emption in a bhayachara village on ground of relationship—Proof of special custom—Value of chakwar wajib-ul-arz—Document containing custom of whole Tashil tribe by tribe—Earlier and later wajib-ul-arz, conflict between—Ss. 31 (2) (b) and 44, Act XVII of 1887 (Punjab Land Revenue).*

Pre-emption—(Continued).

In a suit for pre-emption of land in a *bhaya-chara* village, the grounds being the agnatic relationship of the plaintiff to the vendor and his being a *jaddi malik*, whereas vendee is a *malik* by purchase, plaintiff, in order to prove that relationship helps him, should prove a special custom to that effect.

The *chakwar wajib-ul-arz* is not, properly speaking, part of the settlement record, which is a village record, and, therefore, no presumption of correctness attaches to it under S. 44 of the Act (a).

Even if it be taken to form part of the settlement record, the circumstance that it states the custom of pre-emption as *tribal*, whereas pre-emption is peculiarly a *local* custom, deprives the entry of all its presumptive value (b).

Where a village *wajib-ul-arz* states no custom, but does not exclude it, the party alleging a special custom must prove it. A document, in which customs are stated for a whole Tashil, tribe by tribe, inasmuch as it does not deal with rights and liabilities "in an estate," cannot be said to fall within S. 31 (2), cl. (b). Having, therefore, no presumptive value, it only helps to prove them, and serves as a guide to enquiry, but actual instances of enforcements of the customs stated are necessary.

The value of even a genuine *wajib-ul-arz*, favouring relatives in the matter of pre-emption and standing unsupported by actual proof of custom, followed by a later *wajib-ul-arz*, in which the "law" of Act IV of 1872 is stated to contain the rule of pre-emption, is so small as to be virtually nil. Technically, the value is not nil (c), but even negative indications, the other way, are sufficient to reduce its value to nothing (d). **Guldad Khan v. Gul Khan**, 44 P.R. 1907 = 82 P.L.R. 1908 = 111 P.W.R. 1907.

JOHNSTONE AND SHAH DIN, JJ.

References.—(a) 87 P.R. 1905 and Civil Appeal 127 of 1899, R. (b) 26 C. 81 (P.C.), R. (c) 52 P.R. 1896 and 35 P.R. 1905, R. (d) 27 P.R. 1893; 98 P.R. 1894 (F.B.), 52 P.R. 1896; 78 P.R. 1904; 35 P.R. 1905 and 70 P.R. 1905, R.

(19) *Mahomedan Law—Pre-emption—Talab-i-mowashibat and talab-i-istishad—Unreasonable delay, a question of fact—Action for pre-emption—Claimants, co-sharers as well as mortgagees—Deposit of mortgage money in Court by purchaser—Withdrawal by claimants—Waiver of claim.*

Pre-emption—(Continued).

The right of pre-emption must be exercised, and the claims necessary to give effect to it must be made with the utmost promptitude, and any unreasonable and unnecessary delay is to be construed as an election not to pre-empt. Whether there has been such delay is a question to be determined upon the facts of each particular case.

The plaintiffs, in this case, claimed the right to pre-empt by reason of their having previously acquired a share in the property. They had also obtained the transfer of a *zarpeshqi* mortgage binding the share, the sale of which was the occasion of the present suit. In the course of the suit, the purchaser, defendant, deposited the mortgage amount in Court and the same was withdrawn by the plaintiff.

Held,* that until a decree for pre-emption was made the purchaser owned the land, and had a right to redeem, and that the taking out of the money by the plaintiffs, as mortgagees, was no recognition of anything more than that and was quite consistent with their claim to pre-empt. **Bajjnath Gaenka v. Ramdhari Chowdhury** 12 C.W.N. 419 (P.C.) = 10 Bom. L.R. 253 = 7 C.L.J. 318 = 18 M.L.J. 116 = 3 M.L.T. 349 = 35 C 402

Lord Robertson, Lord Collins and Sir Arthur Wilson.

(20) *Rival claimants for pre-emption—Pre-emptive rights equal—Right of claimants suing subsequently to defeat claimant suing first by obtaining consent decree during pendency of the first suit—Limitation for suits against rival pre-emptor's—Limitation Act, Sch. II, Art 120—Superior diligence, effect of.*

Where a rival claimant of the right of pre-emption obtained a consent decree in a suit to which plaintiff, the first claimant, was not made a party, and the suit in which the rival claimant obtained the consent decree was instituted subsequently to the suit instituted by the plaintiff, the first claimant.

Held, that, the plaintiff having first filed his suit and thus shown superior diligence, the fact that the rival claimant obtained the consent decree did not place the plaintiff in a worse position than that which he occupied when he filed this suit and that the plaintiff was entitled to a decree.

Superior diligence in suing constitutes superior claim to pre-emption (a).

Pre-emption—(Continued)

Held, also, that Art. 120 of the Limitation Act governed suits against rival pre-emptors impleaded after suit filed, (b), and that one pre-emptor may implead another as a co-defendant within the period prescribed by Art. 120 **Ram Parshad v Ganga Datt**, 20 P.R. 1908.

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References (a) 83 P.R. 1888, F (b) 11 P. R 1893, 17.

(21) *Sale of property subject to pre-emption—Suits for pre-emption—Sale by original vendee during pendency of suits to pre-emptor having superior rights—His pendens—Applicability of doctrine.*

A certain property subject to pre-emption was sold to M. After the sale two persons claiming a right of pre-emption separately sued to enforce their rights. During the pendency of those suits, K, a person having a right of pre-emption superior to that of the two former pre-emptors, also brought a suit for pre-emption. His claim was admitted and a registered sale-deed executed by M in his favour. K allowed his own suit to be dismissed in default and applied to be, and was, admitted as a defendant in the former two suits. The Lower Courts decreed against K on the ground that the sale to him was made *pendente lite*.

Held that the doctrine of *his pendens* cannot be called in to defeat the claims of another claimant whose right to pre-empt existed before the suits of the other claimants were filed (a)

A pre-emptor is in no worse position when asserting his right privately than when he asserts it by suit (b).

In claims for pre-emption, the right of any particular claimant is not prejudiced, *qua* own right by the assertion by another claimant of his own pre-existing rights.

The doctrine of *his pendens* forbids the creation of new rights over property already the subject of suit *pendente lite* which are calculated to injure the rights of the claimant. It does not, and could not, apply to the assertion of rights which existed prior to the institution of the pending suit (c). **Mahmud Khan v. Khuda Bakhsh**, 26 P.R. 1908 = 39 P.W.R. 1908 = 145 P.L.R. 1908.

*ROBERTSON AND SHAH DIN, JJ

Pre-emption—(Continued).

References:—(a) 7 P.R. 1896, B. (2) 138 P.R. 1884, 20 A. 100, 73 P.R. 1898, B. (c) 1 D.G. 566, R.

(23) *Vendees becoming by right of purchase landholders in village entitled to pre-empt other property in village purchased subsequently—Land bought first lost in suit by pre-emptor with superior right—Effect of decree in suit on vendees' position—Whether land subsequently purchased, can be retained by such vendees.*

Certain vendees became landholders in a village by reason of a purchase made by them on the 27th July, 1896. They also made a subsequent purchase in the village on the 8th November, 1900. The plaintiff brought a suit for pre-emption in respect of the sale of the 27th July, 1896, which was decreed on 8th January, 1904. The present suit was instituted by the plaintiff, on the 29th October, 1901 for pre-emption in respect of the sale of 8th November, 1900.

Held that the effect of the pre-emption decree of 8-1-04 was to divest the present vendees of their alleged ownership of land under the sale of 27-7-1896 and to vest the same in the plaintiff pre-emptor as from the date of the said sale (a), that at the time of the sale in dispute the vendees were not landholders in the village in which the land was situate and that consequently the plaintiff had a superior right of pre-emption. **Kehr Singh v Mahman Singh**, 25 P.R. 1908=51 P.W.R. 1908 128 P.L.R. 1908.

SHAH DIN, J.

References:—(a) 30 P.R. 1898 (Not.) E., 46 P.R. 1902, and 93 P.R. 1902, R. 44 P.R. 1908, D.

(28) *Wajib-ul-arz—Construction of document—Custom or contract.*

The chapter of a *wajib-ul-arz* dealing, amongst other matters, with pre-emption commenced with a general heading applicable alike to relations based upon custom or upon contract, but the special heading of the clause relating to pre-emption was "*Dastur dar bab hay shafa*." *Held* that this imported a custom and not a contract (a).

Held, also, that a custom securing to co-sharers a right of pre-emption at a fixed price per bigha, without reference to the actual price paid by a stranger, was a custom the enforcement

Pre-emption—(Continued).

of which, when proved, could not be refused (b). **Husain Ali v. Muhammad Umar**, A.W.N. (1908), 98.

KNOX, J.

References:—(a) A.W.N. (1907), 308, D. (b) 10 A. 621 and A.W.N. (1887), 76, referred to.

(24) *Refusal to purchase—Property offered to pre-emptor before completion of agreement with vendee.*

Held that, in order to debar a person entitled to pre-empt a sale from exercising his right, an opportunity must be given to him to purchase when a definite agreement to purchase at a fixed price has been entered into with a stranger it is not enough to offer the property to a person entitled to pre-empt before an agreement to sell has been entered into with a third party. **Munawar Husain v Khadim Ali**, A.W.N. (1908), 93-5 A.L.J. 831.

STANLEY, C.J., AND BURKITT, J.

*Reference:—*27 A 670, F

(25) *Suit for—Ostensible owner, decree for foreclosure, on a mortgage by—Transfer of Property Act, S. 41*

Held that, where a mortgagee foreclosed a share mortgaged to him by one who was merely an ostensible owner, a suit for pre-emption brought by a co-sharer against such a mortgagee could not be defeated on the ground that the mortgagor was not the real owner of the share mortgaged and that the mortgagee had succeeded only by availing himself of the provisions of S. 41 of the Transfer of Property Act. **Sita Ram v. Sheo Prasad**, 11 O. C. 26

CHAMBER, J. C.

(26) *Wajib-ul-arz—Construction of document—Custom or contract*

A village *wajib-ul-arz* under the heading "*As to the transfer of property by sale, mortgage, gift or inheritance, and practice of pre-emption (raam shafa)*"—recorded as follows:—"At present no portion of the share of any co-sharer has been transferred by mortgage. Every co-sharer, with the exception of Musammats janul-un-nissa and Alim-un-nissa, whose shares are in the possession of Ahmad Husain and Barkat Ali, is at liberty to transfer the whole or part of his share in future. No pre-emption suit has as yet been brought or decided. We agree that the custom of the right of pre-emption should prevail in future

Pre-emption—(Continued).

(*Aynda jari rahhna rawaj haq shafa hamansur hai*). Held that this language indicated the making of a contract amongst the co-sharers and not the keeping alive of a pre-existing custom of pre-emption. **Tasadduq Husain Khan v. Ali Husain Khan**, A.W.N. (1908), 121—5 A.L.J. 470.

STANLEY, G.J. AND KARAMAT HUSAIN, J.

Reference:—A.W.N. (05), 16, D.

(27) *Pre-emption—Wajib-ul-arz—Sharik haki at—Malik—Owner of resumed muafi—Preference over co-sharer's in other khata.*

The *wajib-ul-arz* gave a right of pre-emption to *sharik hakiat*, if any, of the *mahkans* who sold their property. Held, that an owner of resumed *muafi* (where that was resumed before the preparation of the *wajib-ul-arz*), was a *malik* within the meaning of the *wajib-ul-arz*, if he was a co-sharer in the same *khata* with the vendor and had a preferential right over a *sharik* of a different *khata*. **Narain Prasad v. Munna Lal**, 5 A.L.J. 302=A.W.N. (1908), 142=30 A. 329.

STANLEY, G.J., AND BURKITT, J.

Reference.—(1881) A.W.N. 165, R

(28) *Wajib-ul-arz, construction of—Custom or contract—Partition—Co-share*

Where a *wajib-ul-arz* opened with a declaration that the zemindars and khewatdars, agreed that up to the term of settlement and in future to the termination of the next settlement they should abide by the following conditions and act upon them, and one of the conditions related to pre-emption, held that the record was one of contract and not custom.

Where a *wajib-ul-arz* recognised a right of pre-emption in favour of co-sharers descended from a common ancestor, and by reason of a subsequent partition, the pre-emptor, though descended from the same stock as the vendor, had ceased to hold any share in the *mahal*, portion of which was the subject of sale, *semble* if the right recorded was one existing by custom, the plaintiff would be entitled to pre-empt. **Budh Singh v. Gopal Rai**, 5 A.L.J. 539=A.W.N. (1908), 246.

STANLEY, G.J., AND KARAMAT HUSAIN, J.

(29) *Interest of co-occupant in survey number sold by auction to satisfy mortgage decree*

Pre-emption—(Continued).

against it—Whether co-occupant can claim pre-emption regarding such property.

The plaintiff was, joint sharer in certain survey numbers in Berar. His co-sharers mortgaged the fields (including his shares) and the mortgagees got a decree for sale of the mortgaged property, and brought it to sale. The plaintiff sued to enforce his right of pre-emption in respect of the shares, other than his own, which had been so sold by auction. Held that the lower Court was right in holding that the suit did not lie, as it can lie only under Chapter XVIII of the Berar Land Revenue Code, since in Berar pre-emption is a right created by statute, and as it did not appear that any provisions of the Code were applicable to the present case. **Maidabi v. Tejabai**, 4 N.L.R. 138.

BATTEN, A.J.C.

(30) *Plaintiff's title at the time of institution of the suit—Title acquired by purchaser subsequent to the cause of action.*

Held, that the plaintiff in a pre-emption suit must be able to show a valid and subsisting title at the time when he brings his suit into Court.

Held, further, that a purchaser may use a title acquired by him subsequently to the origin of the cause of action as a defence against a pre-emption suit instituted after his acquisition of the said title (a). **Tahawwar Khan v. Madho Ram**, 11 O.C. 290.

PIGGOTT, A.J.C.

Reference —(a) 26 A. 389, R.

(31) *Vendee's re-selling the property to one of the vendors before pre-emption suit—Right of pre-emptor, when the re-sale is to a third party having superior right and when it is in favour of the vendor himself.*

Held, that, whenever a pre-emptor sues for pre-emption upon a sale, and it is found that before his suit the vendee has transferred the property to a third party, the test is whether the pre-emptor has a superior right of pre-emption in regard to the first sale as compared with the transferee, and that where it is re-conveyed to the original vendor, the pre-emptor must succeed as the former cannot have any right of pre-emption whatever in regard to the sale.

Pre-emption—(Continued).

which he himself made (a). **Lachhu v Maheshu**, 134 P.W.R. 1908.

JOHNSTONE AND CHITTY, JJ

References:—(a) 80 P.R. 1888, 62 P.R. 1879 and 138 P.R. 1884, F; 27 P.R. 1874; 69 P.R. 1898, 73 P.R. 1898, 93 P.R. 1902 at p 419, 20 A. 100 and 25 A. 421, referred to and I).

(32) *Wajab-ul-arz*:—Sale on "same price as paid by stranger"—No right of intervention among different classes of pre-emptors.

Where a *wajab-ul-arz* recognised a right of pre-emption 'on the same price as paid by a stranger' (*Shah's Ghau*), though it mentioned different categories of pre-emptors, and gave some of them a preferential right over others held, that the right to pre-empt arose only in the case of a sale to a stranger. **Narain Saran Singh v. Sidh Narain Singh**, 5 A.L.J. 655 = A.W.N. (1908), 251.

STANLEY, C.J. AND BANERJI, J.

Reference.—27 A. 456, I.

(33) *Suit for*:—Sale of a residential house in Mohalla Dassan, Delhi City—Custom of pre-emption—S. 11, Punjab Laws Act (1872).

In a suit for pre-emption in respect of the sale of a residential house situate in *mohalla Dassan*, Delhi City, held, that the custom of pre-emption does exist in *mohalla Dassan*, which is a portion of a sub-division which is called sometimes *mohalla Billmarian* **Bhagwanti v. Sohan Lal**, 116 P.R. 1908

RATTIGAN AND LAL CHAND, JJ.

References:—64 P.R. 1887, 44 P.R. 1903, 88 P.R. 1905; 81 P.R. 1906, 120 P.R. 1906, 124 P.R. 1906, and 75 P.L.R. 1906, relied on

(34) *Plaintiff dead*:—Representatives can carry on suit based on custom—Rule of Mahomedan Law—Pre-emptor's right—subsisting on date of decree—Second purchase by vendee—No suit for pre-emption—Vendee's title absolute—Burden of proof

The representative of the pre-emptor in a suit based upon the *wajab-ul-arz* is a co-sharer and can carry on the suit which his predecessor in title instituted. The principle of Mahomedan Law does not apply to a case of pre-emption based on custom.

Pre-emption—(Continued).

A plaintiff claiming pre-emption is not entitled to a decree unless his right subsists upon the date of the decree. Where the vendees purchase a second share in the property and no suit for pre-emption is brought in respect of that share within one year, they are entitled to retain the share formerly purchased and in respect of which a suit for pre-emption had been instituted.

It is for the plaintiff pre-emptor, to show that a suit for pre-emption in respect of the second purchase had been instituted. **Malkhan Singh v. Kashi Prasad**, 5 A.L.J. 752.

BANERJI, J.

(35) Vendee owning small bit of agricultural land used as building site—Whether confers right of pre-emption. See ACT IV OF 1872 (PUNJAB LAWS), No. 2, 109 P.L.R. 1908.

(36) Jurisdiction of Court to pass decree for pre-emption when the sum payable exceeds the Court's pecuniary jurisdiction. See VALUATION OF SUM, No. 1, 46 P.R. 1908.

(37) Agricultural land given to daughter—Sale of such land by her descendant—(Other of her descendants not claiming pre-emption of such land. Heirs of donor entitled to do so. See ACT II OF 1905 (PUNJAB PRE-EMPTION), No. 8-a, 131 P.R. 1908

(38) *Suit for*:—Property in possession of tenant, whether capable of physical possession. See LIMITATION ACT, No. 42, 63 P.L.R. 1908.

(39) Exchange of parts of property liable to—during suit for—binding nature of exchange on pre-emptors. See ACT III OF 1901 (N.W.P. AND O. LAND REVENUE), No. 9, 10 (O.C. 36).

(40) Custom of pre-emption, recorded in *wajab-ul-arz*, in respect of the transfer of a *hajat* of a *hissedar* applies only to co-parceners, and no claim can be maintained in respect of the sale of *ara-ul-dari* land. See PRACTICE, No. 9, 5 A.L.J. 447 (F B).

(41) *Suit for*:—Transaction, whether sale or mortgage—Transaction alleged to be controlled by some agreement—Agreement may be fraudulent and collusive—Effect—Extrinsic evidence. See EVIDENCE ACT, No. 25, 4 N.L.R. 115.

(42) Decree against purchaser in suit by pre-emptor—Vendee's right and vendor's liability—Covenants by vendor. See VENDOR AND VINDEE, No. 3, 111 P.R. 1908.

Pre-emption—(Concluded).

(43) Pre-emptor must pre-empt the whole of the bargain between vendor and vendee or not at all, must take pre-empted property subject to vendor's liability. See **PRE-EMPTION**, No. 6, 5 A.L.J. 112.

(44)—See also under **ACT II OF 1905 (PUNJAB)**.

(44a)—See **CUSTOMS (PUNJAB-PRE-EMPTION)**.

Pregnancy.

Declaratory suit that defendant was not pregnant at her husband's death, not maintainable. See **DECLARATORY SUIT**, No. 1, 12 P.W.R. 1908.

Presidency Small Cause Courts Act.

See **ACT XV OF 1892**

Presumption.

(1)—as to status from uniform payment of rent after record of rights published. See **ACT VIII OF 1885 (BENGAL TENANCY)**, No. 7, 12 C.W.N. 904.

(2)—as to local publication of record as required by S. 103-A of Act V of 1897 (Partition)—Regularity of proceedings of officer conducting partition. See **ACT V OF 1897 (PARTITION)**, No. 2, 13 C.W.N. 93.

(3)—of law regarding person in whom property in timber on tenant's holding vests—Right of tenant to cut and remove such timber. See **LANDLORD AND TENANT**, No. 1, 5 A.L.J. 99.

(4) Some, at least, of property of joint family coming down to it—presumption of whole property being ancestral. See **HINDU LAW (JOINT FAMILY)** No. 4, 10 Bom. L.R. 184.

Primogeniture

(1) *Restriction on alienation—Civ. Pro. Code (Act XIV of 1882), S. 162—Leave of Court, if to be express—Presumption—Compromise—decree when to be set aside*

Where there is a custom of primogeniture, there is no restriction on alienation by the incumbent for the time being, unless a special custom is proved to the contrary (a).

In order that a compromise may be binding upon a minor, the leave of the Court must be express, and further it must be arrived at upon the exercise of judicial discretion as to the propriety of the compromise in the interests of the minor (b).

Primogeniture—(Concluded).

Where a decree was passed without any judicial inquiry, or finding as to whether the compromise was for the benefit of the minor, although a formal order of sanction to file the compromise petition was given by an Official of the Court who acted as the minor's guardian *ad litem*

Held, that the decree was inoperative

When the Court permits a compromise, it must be presumed in the absence of evidence to the contrary that it gave due consideration to the matter (c)

Although in appeal, a decree made upon a compromise in a suit in which a minor was a party, would be held to be invalid as against a minor, it could not, after it had become final and been acted upon, be set aside, unless it were shown to be prejudicial to the minor (b). **Krishna Pershad Roy v. Romesh Chunder Mandal**. 5 C.L.J. 274

HOLMWOOD AND SHARFUDIN, JJ.

References—(a) 22 M. 383, 26 I.A. 83, b (b) 16 W.R. 242, 9 C. 810, 7 C.W.N. 90, 8 C. L.J. 266, P. 26 B. 109, 17 A. 531, 29 M. 103, P. (c) 5 C.L.J. 31, D. (d) 20 A. 98, P.

Principal and agent

(1) Suit for accounts by principal against his agent—*Termination*. See **ACCOUNTS**, No. 1, 7 C.L.J. 279.

(2) Agent who has to pay money to his principal must follow him and pay where his principal is. See **CONTRACT**, No. 3, 11 O.C. 191

(3) Agent deriving his authority from a written instrument—Duties of third party dealing with such agent. See **MARUMAKKARA VAM LAW** No. 1, 23 T.L.R. 1.

(4) Liability of principal to pay agent sums due on account of waging contract. See **WAGERING CONTRACTS**, No. 1, 79 P.R. 1908 (F.B.)

Priority.

(1)—of other shares of joint estate, entitled, under partition decree, to receive dowry money from co-shares over mortgagees of that co-sharer's undivided share in joint estate. See **PARTITION**, No. 4, 12 C.W.N. 373

(2) Applicability of priorities given by S. 12 of the Punjab Pre-emption Act II of 1905 to a claim to right of pre-emption with reference

Priority—(Concluded).

to a sale executed before the commencement of the Act. See **PREFEMPTION**, No. 12, 18 P.W. R. 1908 (F.B.).

Privilege.

(1) Foundation of doctrine of—Welfare of society. See **LIBEL**, No. 2, 12 C.W.N. 1058 (P.C.).

(2)—attaching to documents—Such documents to be properly described for identification—Documents passing between a Company and its officials after threatened suit not *per se* privileged. See **EVIDENCE**, No. 3, 10 Bom. L.R. 796.

(3) Criticism of Judge or Court how far justifiable—Language which strikes at the root of all respect for the Court and its authority amounts to contempt of Court. See **CONTEMPT OF COURT**, No. 1, 10 Bom. L.R. 1040.

(4) Privileged communication—Malice, proof of. See **DEFAMATION**, No. 1, 88 P.R. 1908.

Privy Council.

(1) *Question of fact and of appreciation of evidence—Evidence, such as might justify either view—Court of review—Procedure—Practice.*

Where the question is essentially one of fact, and of the weight and credibility of evidence, upon which a Court of review can never be in quite as good a position to form an opinion as the Court of first instance, it would probably be enough to prevent their Lordships from interfering, if it should appear that there was evidence, such as might justify either view, without any clear preponderance of probability. **Fatima Bibi v. Sheikh Ahmed Buksh**, 10 Bom. L.R. 50 (P.C.)=12 C.W.N. 214=3 M. L.T. 110=7 C.L.J. 122=18 M.L.J. 6=35 C. 271=14 Bur. L.R. 269.

LORD ROBERTSON, LORD COLLINS AND SIR ARTHUR WILSON.

(2) Practice—Points not submitted to either Courts in India raised before the Privy Council—cannot be considered. See **MARRIAGE**, No. 1, 10 Bom. L.R. 41 (P.C.).

(3) Practice of—Point not taken before either of the lower Courts, whether can be taken before the Privy Council. See **MORTGAGE (REDEMPTION)**, No. 4, 10 Bom. L.R. 126 (P.C.).

(4) Whether appeal lies from Governor-General's agent in Bhopal to. See **ARBITRATION**, No. 3, 12 C.W.N. 595 (P.C.).

Privy Council—(Concluded).

(5) Where question of fact involved legal considerations in every point in the reasoning process, though findings of Indian Courts were concurrent, the Privy Council could review such findings in appeal. See **REG. III OF 1891**, No. 1, 12 C.W.N. 1095.

Probate.

(1) *Probate—Bequest of life-interest—Legatee not entitled to probate—Amendment of application for probate to include prayer for Letters of Administration not allowed.*

Where a Hindu testator bequeathed life-interests in the income of certain specified properties in favour of his widows, and the remaining property in favour of his son, and one of the widows obtained a probate in respect of the property whose income was bequeathed to her.

Held, that the widow, not being mentioned in the will, as executrix, either expressly or impliedly, was not entitled to the probate (a).

Held, also, that as the son had a preferable right to be appointed administrator of the estate, amendment of the application for probate could not be allowed to include a prayer for grant of letters of administration with a copy of the will. **Mehar Chand v. Mussammat Lachhmi**, 75 P.L.R. 1908.

CHATTERJI, J.

References—(a) 22 W.R. (Eng.) 874; 7 B.L.R. 563; 15 M. 360, and 19 C. 582, R.

(2) *Will—Probate—Revocation—Locus standi of co-executor to challenge genuineness of will.*

When a probate having been granted in the name of several persons as executors, one of them applied for revocation on the ground that the will was a forgery and that he himself did not apply for probate and was not cited, and that the probate was obtained behind his back.

Held—That he was entitled to have his name struck out of the probate, but he had no *locus standi* to challenge the will. **Srinath Ghosh v. Mukundram Chuckerbutty**, 12 C.W.N. 578.

MACLEAN, C.J. AND DOSS, J.

(3) Application for probate by executor's son—Discretion. See **ACT V OF 1881 (PROBATE AND ADMINISTRATION)**, No. 5, 7 C.L.J. 558.

Probate—(Concluded).

(4) Application for extension of probate to whole of British India—Non-compliance with preliminaries required by Act VIII of 1903—Effect. See ACT X of 1865 (SUCCESSION), No. 5, 1 Sind L.R. 177.

(5) Application for, by official trustee—Intention to renounce expressed in a letter—Subsequent retraction—Effect. See ACT V of 1881 (PROBATE AND ADMINISTRATION), No. 3, 35 C. 156.

(6) Pleador's fees in appeals in probate proceedings should, according to a long standing practice of the High Court, be assessed at Rs. 30. See PLEADER'S FEE, No. 1, 10 Bom. L.R. 1197.

Probate and Administration Act

See ACT V of 1881

Procedure

(1) Refusal of Court of first instance to examine all the plaintiff's witnesses—
Appeal by defendant decreed—Remand

* Owing to the direction of the Court of first instance only a portion of the evidence available in support of the plaintiff's case was recorded by that Court, which decreed the plaintiff's suit. On appeal, however, the lower Appellate Court took a different view of the plaintiff's evidence and dismissed the suit. Held that the plaintiff should be given an opportunity of producing the evidence which had not been recorded owing to the attitude taken up by the Court of first instance. **Pabitra Kunwar, v. The Maharaja of Benares**, A.W.N. (1908), 140-5 A.L.J. 468-30 A. 367.

STANLEY, C.J., AND KARAMAT HUSAIN, J.

References.—11 C.W.N. (Notes), p. xcii and A.W.N. (05), 266, R.

(2) Special procedure being, provided for extraordinary extra-judicial methods of settling disputed claims—Intention of the Legislature—No other procedure to be followed. See ARBITRATION, No. 2, 10 Bom. L.R. 366.

(3)—of S. 561, C.P.C., applicable to appeals from orders. See CIV. PRO. CODE, No. 310, 3 M.L.T. 248.

(4)—When objection to jurisdiction is taken for the first time on appeal—S. 16 (a), sub-S. 2, Civ. Pro. Code—Refusal of objection. See JURISDICTION (GENERAL), No. 2, 7 C.L.J. 152.

Procedure—(Concluded).

(5) Agreement by plaintiff to take oath or to have the suit dismissed—Failure to take oath—Procedure to be adopted by the Court. See ACT X of 1873 (OATHS), No. 2, 17 M.L.J. 545-3 M.L.T. 98.

(6) Compromise decree not in accordance with relief claimed for in the plaint. See CIV. PRO. CODE, No. 236, 77 P.R. 1908.

(7) Suit—Dismissal—Appeal by plaintiff and defendant—Plaintiff's appeal to be heard first. If plaintiff's objections well-founded, defendant should be heard. See APPEAL (GENERAL), No. 4, 8 C.L.J. 552.

Profession tax.

See ACT IV of 1884 (DISTRICT MUNICIPALITIES), No. 1, 4 M.L.T. 477.

Pro forma defendant.

—joined as plaintiff—Added plaintiff—"New plaintiff" See LIMITATION ACT, No. 33, 8 C.L.J. 286.

"Promisee."

Who are included under—. See CONTRACT ACT, No. 1, 4 M.L.T. 335

Promissory Note

(1) Promissory note payable to order—Discounted with a bank—Bank returning the note to maker, it not being para—Subsequent endorsement in blank and delivery to another without striking out first endorsement—Delivery again to plaintiff to enable him to sue upon it—Whether plaintiff was holder in due course—S. 50, Negotiable Instruments Act, 1881.

A promissory note was given by the defendant to P.S., in connection with some partnership transactions between them, on those transactions being brought to an end. P.S. discounted the note with the Bank of Bengal; when it was not paid, the Bank returned the note to him. He subsequently handed the note to one C.J., to whom he owed money, and wrote his second signature on the back of the note. C.J. handed it to his clerk, the plaintiff, in order that the latter may file a suit on it. In a suit by the plaintiff against the defendant to recover the amount.

Held that the plaintiff was not a holder in due course of the note and did not become the possessor of it for consideration; the legal title

Promissory Note—(Continued)

to it was in the Bank of Bengal, since the endorsement to it was an endorsement in full, and there was no endorsement by it to any one else in full or in blank.

Held, also, that the plaintiff had no right at all to sue upon it, as he did not prove his title to it either (1) by negotiation, for the note was payable to order and was indorsed to order and that endorsement was not struck out, a note in such condition could only be negotiated by endorsement and delivery by the last indorsee to order. The title by negotiation must be taken to be that shown by what was on the back of the note, and the Bank of Bengal, not having endorsed it, either in full or in blank the title by negotiation stopped with (a), or (2) by assignment, for C.J. handed the note to the plaintiff to enable him to file suit on it and the plaintiff said that he simply filed the case under the instructions of C.J.

The note having been discounted with the bank and the endorsement not containing express words restricting or excluding the right of further negotiation, the endorsement was not for collection, as contended (b). In order that a right of further negotiation may be restricted or excluded in respect of a promissory note S. 50 of the Negotiable Instruments Act, 1881 requires that an endorsement must contain express words to that effect. **Babu Goridut Bogla v. Ebrahim (Solaiman) Esoof Doopley**, 14 Bur. L.R. 25.

FOX, C.J. AND LUTWILL

References —(a) 10 C.B.N.S. 190, R. (b) 28 M. 544, L. and discussed

(2)—*Negotiable, suit on—(Case in action, assignment of—must be in writing—Transfer of Property Act Ss. 130 and 137*

In a suit by the plaintiff on a negotiable pro-note, executed in favour of the managing member of his family, it was *held*, (1) that, if the suit was regarded as one on the pro-note, the suit must fail, as there was no endorsement in plaintiff's favour (a), and (2) if the suit be regarded as one by the assignee of the chose in action, then the assignment must be in writing as required by S. 130 of the Transfer of Property Act (b).

In the latter case, he could not be regarded as suing on a negotiable instrument, and, therefore would not come within the exceptions in

Promissory Note—(Concluded)

S. 137 of the Transfer of Property Act. **Arunachala Reddi v. Subba Reddi**, 17 M.L.J. 393=8 M.L.T. 7.

BENSON AND WALLIS, JJ.

References —(a) 30 M. 88, F. (b) 24 M. 664, R.

(3) *Suit by person other than a payee of a promissory note—Payee being made defendant in the suit, effect of.—*

Under the Negotiable Instruments Act, the only person entitled to sue, on a promissory note, is the payee, or the holder. Any person, other than the payee, has no right of suit thereon, whether the same is negotiable or not.

The fact that the payee named in the note is made one of the defendants in the suit does not alter the principal. **Subramanya Tevan v. Arunachala Tevan**, 18 M.L.J. 186.

WHITE, C.J. AND MILLER, J.

References —(a) 28 M. 205, 30 M. 88, F.

(1)—being the record of the loan transaction—Right to resort to original consideration—Admissibility of oral evidence. See EVIDENCE ACT, No. 16, 17 B.R. (1907), 3rd Quarter, Ev. 5.

(5) *Suit on—Suit by assignee—Assignment not made in fact—Oath as to consideration effect* See ACT X OF 1873 (OATH), No. 1, 3 M. L.T. 163

(6) *Parties to note agreeing that, on promisor executing bond for the amount due in favour of third party, promisee will cancel note—Validity of such arrangement, irrespective of payment by third party to promisee—Assignment of promissory note without endorsement.* See CIV. PRO. CODE, No. 1, 12 C.W.N. 1102.

(7)—*banded to usufructuary mortgagee, dispossessed originally under S. 43, Act I of 1902 (Madras), on being restored to possession after ward's death—Effect of pro-notes not being endorsed—Operation of law.* See MORTGAGE (USFRUCTUARY), No. 4, 4 M.L.T. 341.

(8) See MORTGAGE (EQUITABLE), No. 2, 14 Bur. L.R. 283.

Property.

(1) *Right of every person to use his property as he thinks fit, irrespective of others' susceptibilities, without infringing the law of the land*

Property—(Concluded).

d rights of others. See PUBLIC NUISANCE.
No. 1, A.W.N. (1908); 64

Propinquity.

Texts or precedents absent under the Dabhaga Law—Theory of—and natural love and affection as propounded by Vignaneswara and writers of orthodox school of Hindu Law to be resorted to. See HINDU LAW (INHERITANCE), No. 4, 12 C.W.N. 511

Proprietary Estate's Village Service Act

See ACT II OF 1894 (MAHARAS)

Prostitute.

Lease of house to prostitute—Public policy contravened—Agreement immoral. See CONTRACT ACT, No. 10, A.W.N. (1908), 285

Protection of Judicial Officers Act.

See ACT XVIII OF 1850.

Protection of Property Act, in cases of Succession.

See ACT XIX OF 1841.

Provident Funds Act.

See ACT IX OF 1897

Provincial Small Cause Courts Act

See ACT IX OF 1887

Public Demands Recovery Act

See ACT I OF 1895 (BENGAL)

Public Nuisance.

(1) *Killing of cows by Muhammadans—Custom.*

Acts calculated to offend the sentiments of a class do not necessarily amount to a public nuisance

Under certain limitations, the slaughtering of kine by Muhammadans is not illegal. It is the legal right of every person to make such use of his own property, as he may think fit, provided that, in so doing, he does not cause real injury to others, or offend against the law, even though he may thereby hurt the susceptibilities of others. The right of Muhammadans to slaughter kine is one to which they are legally entitled irrespective of custom, and it is only when they abuse the right that it ever-

Public Nuisance—(Concluded).

case can be interfered with (a). **Shahbaz Khan v. Umrao Puri**, A.W.N. (1908), 64=5 A.L.J. 147=7 Cr. L.J. 381=30 A. 181

STANLEY, C.J. AND BURKITT, J.

References.—(a) 7 M. 590; 12 B. 430, 10 A. 44; 10 A. 150, 17 C. 852, 25 W.R. 72 and 2nd App. No. 1028 of 1881, All H. C., (Unrep.), referred to.

Public servant.

(1) Act of, in closing irrigation canal—authorised by statute—Tortious eviction—Suit against—Right to withhold rent. See LANDLORD AND TENANT, No. 25, 1 S.L.R. 244.

(2) Contract with public servant—Conflict with public duties—Contract void. See CONTRACT ACT, No. 15, 13 C.W.N. 59.

Puffing statements

—, if fraudulent. See COPYRIGHT No. 1, 12 C.W.N. 75.

Punjab Courts Act.

See ACT XVIII OF 1884 (PUNJAB)

Punjab Laws Act

See ACT IV OF 1872 (PUNJAB).

Purchase money.

Suit by vendor to enforce payment of purchase money by sale of purchased property, nature of. See LIMITATION ACT, No. 75, A.W.N. (1908), 71

Purchaser.

(1) Personal covenant for title by vendor in favour of vendee—Right of pre-emptor to enforce the covenant. See PRE-EMPTION, No. 11, 141 P.R. 1907=93 P.W.R. 1907=57 P.L.R. 1908

(2) Contract to sell immovable property—Damages for breach of contract—Contract Act, S. 73. See DAMAGES, No. 1, 9 Bom. L.R. 1087.

(3)—of a portion of an occupancy holding, right of, to make a deposit, under S. 310-A, C.P.C. See CIV. PROC. CODE, No. 206, 7 C.L.J. 282.

(4) Right of purchaser of property at execution-sale—Property subject to a mortgage, but not mortgage executed by the judgment-debtor. See DECREE, No. 6, 35 C. 877.

Purchaser—(Concluded).

(5) Pre-emption—Plaintiff's title at the time of institution of the suit—Title acquired by purchaser subsequent to the cause of action. See *PRE-EMPTION*, No. 30, 11 O.C. 290.

(6) See *VENDOR AND VENDEE*.

"Putra Pantadi Santan."

—, meaning of. See *CONSTRUCTION (OF DEEDS)*, No. 1, 7 C.L.J. 291.

Pyatbaing.

—, meaning of. See *GIFT*, No. 1, 14 Bur. L. R. 30.

Rack rent.

—and net produce, relation between. See *MESNE PROFITS*, No. 1, 12 C.W.N. 650.

Railway.

Claim for compensation for short delivery of goods—Notice of claim on whom to be served—Service on Traffic Manager—Whether notice should be physically thrust in the hands of the Agent. See *ACT IX OF 1890 (RAILWAYS)*, No. 1, 13 C.W.N. 24.

Railways Act.

See *ACT IX OF 1890*.

Rateable distribution.

Decree-holder applying for execution before realisation—Right of his representatives to rateable distribution. See *Civ. Pro Code*, No. 360, 3 M.L.T. 249.

Ratification.

(1) Where transfer is void *ab initio*, whether subsequent ratification can validate it. See *MAHOMEDAN LAW (GUARDIAN)*, No. 2, 11 O.C. 1.

(2) Applicability of term only to acts done on ratifier's behalf—Recognition of this rule in *Contract Act*, S. 196. See *HINDU LAW (ALIENATION)*, No. 18, 12 C.W.N. 393.

(3) Conditions under which doctrine of ratification is applicable. See *HINDU LAW (REVERSIONERS)*, No. 6, 8 C.L.J. 458.

Reasonable time.

—for appointment of legal representative. See *CONTRACT ACT*, No. 1, 4 M.L.T. 335.

Receiver.

(1) *Appointment of, in testamentary suit—Validity of will for dharmarth.*

A receiver should not be appointed in a testamentary suit to take charge of property in the hands of a defendant unless—(a) there

Receiver—(Continued).

is a fair probability of the suit succeeding; and (b) there is an allegation that the defendant is wasting, or about to waste, the property or is incapable of managing it; and (c) there is some proof of this allegation by affidavit or otherwise.

Where the bulk of the property is to be used for *dharmarth*, it is doubtful whether such provisions in a will are capable of being carried out, inasmuch as *dharmarth* covers an infinity of purposes. *Kesar Devi v. Partab Singh*, 39 P.R. 1908=91 P.W.R. 1908=185 P.L.R. 1908.

JOHNSTON, J.

(2) *Lease—Application to set aside—Summary jurisdiction—Pro interesse suo—Receiver's account—Action—Practice.*

No summary order can be passed to set aside a lease already executed and granted by a Receiver. The proper remedy of the aggrieved parties is to institute a regular suit to set aside the lease against the Receiver and also the lessee, if it is alleged that the lease was obtained by collusion (a)

No order can be made against a lessee from a Receiver for arrears of rent or interest in an application in a suit. A regular suit ought to be instituted to recover them.

The claims against a Receiver for giving up arrears of rent or interest, due under a lease granted by him, are matters which cannot be dealt with in an interlocutory application in the suit.

Quare—Whether the Court can go into such matters on the passing of the Receiver's accounts, or the parties must file a suit in respect of them against the Receiver. *Krista Chandra Ghose v. Krista Sakha Ghose*, 12 C.W.N. 1023.

WOODROFFE, J.

Reference—(a) 15 C. 253, D.

(3) *Appointment of a receiver—not to be made without special reasons—Bona fide possessor with legal title.*

The appointment of a receiver is entirely in the discretion of the Court. But the power of appointment is not to be exercised as a matter of course, but should be used with the greatest care and caution. A good *prima facie* title has to be made out before an order for the appointment of a receiver can be granted (a).

Receiver—(Continued).

The step of appointing a receiver should not be taken without special reasons, particularly in the case of a *bona fide* possessor with legal title.* Parties who have acquiesced in property being enjoyed against their own alleged rights cannot come to Court for this form of relief(b). **Nga Kyi Maung v. Mi Sin**, U.B.R. (1908), 2nd Quarter, Civil Procedure, p. 17.

TWOMEY, J.

References:—(a) 5 A. 556 and 22 C. 459, P., and (b) 6 C.L.R. 467, F.

- (4) *Principles relating to the appointment of—Proof of mismanagement necessary—S 503, C.P.C.—Suit against a tenant for life.*

The appointment of a Receiver under S. 503, C.P.C., is not a matter of course. Though S. 503 gives a wide power to the Court, that power must be exercised with a sound discretion on a view of the whole of the circumstances of the case, not merely the circumstances which might make the appointment expedient for the protection of the property, but all the circumstances connected with the right which is asserted and has to be established. Unless there is proof of violent and wholesale charges of waste and malversation against a defendant in possession of property as the tenant for life, a Receiver will not be appointed. **Jiwani v. Labhu Ram**, 107 P.R. 1908.

RATTIGAN, J.

References:—5 A. 561; 15 C. 818; 73 P.R. 1902, *relied on*.

- (5) Suit against receiver—Leave to sue whether necessary. See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), No. 8, 17 M.L.J. 483.

- (6) Decree holder attaching two decrees held by judgment debtor against third parties—Power of Court to appoint receiver to realise amounts of decrees under attachment. See CIV. PRO. CODE, No. 266, A.W.N. (1908), 164.

- (7) Suit for a scheme of management of a temple and for appointment in the meanwhile of a receiver—Power of Court to appoint receiver. See CIV. PRO. CODE, No. 54, 4 M.L.T. 88.

- (8) Appointment of receiver by High Court pending appeal—Power of Subordinate Court to give directions as supplementary to those given by the High Court. See CIV. PRO. CODE, No. 267, 4 M.L.T. 268.

Receiver—(Concluded).

- (9) Recommendation by Subordinate Judge to District Judge as to the appointment of a receiver—Refusal by the latter to appoint—Right of appeal. See CIV. PRO. CODE, No. 270, 10 Bm. L.R. 1037.

Record of rights.

- (1) Application to correct entry made before amending Act of 1898 of Bengal Tenancy Act, 1885—Reference to Civil Court under amending Act valid, though proceedings commenced prior to passing of amending Act. See ACT VIII OF 1885 (BENGAL TENANCY), No. 23, 12 C.W.N. 987.

- (2) Suit to correct or alter entries in—not maintainable—Recourse to be had to special remedy provided in Ch. X, Bengal Tenancy Act. See ACT VIII OF 1885 (BENGAL TENANCY), No. 21, 12 C.W.N. 1032.

Refund

- (1) First lessee delivering possession of land to subsequent lessee on payment of compensation—Such lessee afterwards becoming entitled to restitution of land by decree of Court—refund of compensation money by such lessee whether a condition precedent to his obtaining relief by way of restitution. See CIV. PRO. CODE, No. 296, 18 M.L.J. 39.

- (2) of money realised in execution of a decree afterwards reversed on appeal—Remedy whether by suit or application. See EXECUTION OF DECREE, No. 16, A.W.N. (1908), 206.

Registrar

- of High Court whether empowered to grant leave to institute suit under cl. 12 of the Letters Patent, 1865. See LETTERS PATENT (CALCUTTA, 1865), No. 1, 7 C.L.J. 441.

Registration

- (1) *Compromise petition, constituting a lease and filed in a criminal proceeding—Registration, if necessary.*

Plaintiff sued a tenant for increased rent on the basis of a petition of compromise filed in a criminal proceeding, which resulted in the withdrawal of the proceeding, though no order was passed incorporating the terms of the petition.

Held, that the petition was not admissible in evidence without registration.

If the petition had been filed in a civil proceeding and had been followed by an order pr

Registration—(Concluded).

decree which embodied directly or indirectly its terms, then it would not have been necessary to have had it registered (a). **Biraj Mohini Dassi v. Kedar Nath Karmokar**, 12 C.W.N. 954—8 C.L.J. 90—35 C. 1010.

MACLEAN, C.J., AND DOSS, J.

References.—(a) 8 C.W.N. 485, 1 L.R. 26 (A 101, 22 M. 508; 80 C. 783, and 1 C.L.J. 388, referred to

(2) Effect of, on failure of prior mortgagee to get possession of title deeds—Delay in. See TRANSFER OF PROPERTY ACT, No. 40, 17 M.L.J. 499.

(3) Transfer of property in lieu of dower debt, being sale, could only be effected by delivery of registered instrument. See MAHOMUDAN LAW (DOWER), No. 3, 13 C.W.N. 160

(4) Unregistered lease, where registration is necessary—Admissibility in evidence. See LEASE, No. 1, 10 BOM. L.R. 1146

Registration Act (III of 1877)

(1) Security bond given under Civil Procedure Code, S. 545—Transfer of Property Act, S. 58—Order accepting security

A security bond, whereby immovable property exceeding Rs. 100 in value was pledged to the Court. It was signed by the obligor and attested by two witnesses. The Court endorsed thereupon the words "security is accepted." Under these circumstances, it was contended that the deed did not require registration. *Held* the deed fell under S. 58 of the Transfer of Property Act and required registration under S. 59, as amended by S. 3 of Act VI of 1904 and S. 17 of the Registration Act. *Held*, also, the words "security is accepted" merely meant an intimation by the Court that the property given as security was sufficient for the purpose. **Nagaruru Sambayya v. Tanjatur Subbayya**, 3 M.L.T. 317—31 M. 370

BENSON AND MUNRO, JJ.

References.—32 C. 494, 13 M. 1, 13 M. 203, 22 M. 508 and 20 A. 171, *It*

(2) S. 3—Standing timber—Moveable property—Ss. 3 and 4, General Clauses Act. See ACT VIII OF 1885 (BENGAL), No. 24, C.L.J. 152

(3) Deed providing mode of partition of immovable property of the value of Rs. 100 to be acquired in future—Explanation of clause (b) of S. 17 of Act III of 1877—

Registration Act (III of 1877)—(Continued).

"Vested" and "contingent" defined—Transfer of Property Act IV of 1882, Ss. 19 and 21—Agreement inadmissible—Oral evidence barred—S. 91, Indian Evidence Act.

Held, that, in S. 17 (b) of Act III of 1877 the clause, "whether in present or in future" belongs to the bunch of infinitives preceding it and not to the nouns "right, title or interest," consequently the "right, title or interest," whether vested or contingent must be a present and not a future, right, title or interest.

Held, also, that a deed prescribing the mode of partition of certain immovable property of the value of Rs. 100 or more, to be acquired in future by the parties thereto, does not fall under cl. (b) of S. 17 of Act III of 1877.

Held further, that the definition of "vested and contingent" given respectively in Ss. 19 and 21 of Act IV of 1882, are applicable to these terms used in S. 17 (b) of Act III of 1877 (a).

Where an agreement is inadmissible, oral evidence is barred. **Bhan Singh v. Thakar Das**, 89 P.R. 1908—145 P.W.R. 1908.

CHARR, C.J. AND CHEVIL, J.

References.—16 P.R. 1895, 82 P.R. 1884, 150 P.R. 1889, 30 B. 304, 30 C. 1016, *It*.

(4) S. 17—Mortgage-decree for Rs. 100 or upwards—Sale by unregistered deed—Validity—Civ. Pro. Code (Act XIV of 1882), Ss. 232 and 559—Preferring a second appeal against parties against whom there has no appeal—Application to make parties to appeal after expiry of time.

A mortgage-decree for Rs. 100 or more is assignable without registration (a).

The validity of an assignment of a decree cannot be questioned after the assignee has been placed on the record as substituted decree holder.

A respondent should not be placed on the record under S. 559 of the C.P.C. after the time for appealing against him has expired.

In a second appeal no decree can be passed against a respondent against whom there was no first appeal. **Ram Ratan Chuckerbutty v. Jogesh Chandra Bhattacharya**, 12 C.W.N. 625.

MITRA AND CASPERSEN, JJ.

References.—(a) 23 C. 450, 6 C.W.N. 5, followed, 9 C. 839, considered.

Registration Act (III of 1877)—(Continued).

- (5) *S. 17—Unregistered deed of partition, evidentiary value of—Suit based on unregistered document inadmissible in evidence, effect of admission of defendants.*

It is no doubt the policy of the Legislature that all documents affecting immovable property should be registered. Documents, to be admitted in evidence of any transaction affecting immovable properties, require registration. An unregistered deed of partition is not admissible in evidence to prove the transaction in so far as it affects the immovable properties divided among the parties, but it is admissible to prove that the co-partners therein referred to have become divided members.

Such document is also admissible to prove the arrangement come to regarding movable—*(a).*

The admissions of the defendants do not make an unregistered document admissible as evidence in so far as the immovable property is concerned, not can secondary evidence be given of its contents, but *vis à* decree may be given on the admission of the defendants *(b)*
S. A. Subramania Iyer v Savitri Ammal, 4 M.L.T. 354

SANKARAN NAIR AND PINNEY JJ

References —(a) 15 M. 846 J' (b) 1 M.H.C. R. 342, II.

(6) *S. 17—Judicial proceedings consisting of pleadings filed by the parties—Orders made by Court—Whether section is applicable* See COMPROMISE, No. 2 7 C.L.J. 492

- (7) *S. 17 (a)—Sale certificate granted by Collector—Sale of "B. class" lands—Transfer of title—Registration*

Sale certificates granted by the Collector in accordance with the Rules issued by the Board of Revenue after the sale of "B. class" or surplus lands acquired by Government under the Land Acquisition Act, are sufficient in themselves to transfer the title from the Government to the transferee, and S. 17, cl. (a) of the Registration Act is authority for the proposition that such certificates are sufficient to validate the transfer of title to the transferee without being registered. **Sarat Chunder Roy Chowdhury v. Jatindra Nath Mukerjee**, 35 C. 614

BUTT, J.

(8) *S. 17 (b)—S. 59, Transfer of Property Act—Test to be applied to see whether mortgage deed requires or does not require registration.*

Registration Act (III of 1877)—(Continued).

See TRANSFER OF PROPERTY ACT, No. 28, 1 N. L.R. 86.

(9) *S. 17, cl. (b)—Mortgage—Mutation of names objected to—Compromise, varying terms of registered mortgage deed—Suit for redemption—Admissibility of compromise deed in evidence—Terms of registered mortgage deed can be varied only by registered instrument* See EVIDENCE ACT, No. 21, 5 A.L.J. 717

(10) *S. 17 (d)—Whether unregistered deeds, executed by proprietary body owning *shamlat* land alleged to create *muqarraridari* rights, admissible in evidence* See CUSTOMS (PUNJAB—SHAMLAT LAND), No. 1, 189 P.L.R. 1908

(11) *S. 17 (d) Unregistered dastak allowing plaintiff to take possession of land for cultivation—Document not a lease within section* See RENT ACT OF 1825 (BENGAL AUCUTION AND DERIVATION), No. 1, 8 C.L.J. 538

- (12) *Ss. 17, 41 and 49—Attorney, power of, to create a charge on immovable property*

Where a power of attorney was executed by A in favour of B to enable B to recover the rents and profits of the properties of which A was the administrator, in order to pay off an amount advanced by B to A as such administrator

Held that in as much as the document was entered in Book IV instead of Book I, it was not registered according to the provisions of the Registration Act, and therefore could not affect immovable property *(a)* **Srimati Indra Bibi v. Jain Sirdar Ahiri** 7 C.L.J. 149 -12 C.W.N. 316-35 C 845

MACLEAN, C.J., HARRINGTON AND FIELDING, JJ.

Reference —(a) 7 C. 196, II

(13) *Ss. 17 and 49—Unregistered lease—admissibility to prove adverse possession.* See LIMITATION, No. 9, 17 M.L.J. 469 -3 M.L.T. 187.

(14) *Ss. 17 and 49—Mortgage with possession—Second mortgage by an unregistered deed to secure a fresh advance—Delivery of property—Necessity for registration.* See MORTGAGE (REDEMPTION), No. 17, 11 O.C. 248

- (15) *Ss. 17 (d) and 49—Mortgage—Mortgagee with power to assign the lands leasing out in perpetuity—Registration—Second appeal.*

A mortgagee with power to assign the lands gave the defendant a lease in perpetuity of the lands in question at a rent of eight annas per acre.

Registration Act (III of 1877)—(Continued).

Held, the instrument giving the right to hold the land in perpetuity was a lease within S. 17(d) of the Registration Act, to which the exception referred to in the proviso to the section did not apply, and that the lease, not having been registered, could not under S. 49 of the Act be received in evidence (a).

Held, also that it was open to the High Court in second appeal to dispose of the case on the ground of non-registration of the document on which the defendant relied, although the point was not discussed by the lower Courts and it was not clear that the point was taken in the Courts below. **Srinivasa Aiyangar v Parthasarthy Aiyangar**, 4 M.L.T. 79.

WHITE, C.J., AND MILLER,

Reference:—(a) 27 M. 43, 11.

(16) Ss. 18 (a) and 50—Registered sale-deed—Prior unregistered mortgage—Priority.

Under Ss. 18 (a) and 50, a registered sale-deed prevails over the prior unregistered mortgage. **Artha Nahako v. Bhagavan Nahako**, 4 M.L.T. 64.

WHITE, C.J., AND SANKARAN NAIR, J.

(16-a) S. 31—See No. 12, *supra*.

(17) Ss. 32, 73, 71, 76 and 77—Registration—Refusal to register by Sub-Registrar on the ground of denial of execution—Refusal by Registrar to direct registration, without making inquiry—Suit to enforce registration, maintainability of.

Held, that all that is necessary to establish, in order to maintain a suit under S. 77 of the Registration Act, is a refusal to register by a Sub-Registrar, an application to the Registrar within time, and a refusal by him.

Held, further that the fact that the Registrar has not held a full enquiry under S. 73 or has taken a wrong view of the law when holding an inquiry under that section does not bar the suit (a). **Partit Singh v. Ram Singh**, 11 O.C. 353.

CHAMBER, J.C.

Reference:—(a) 24 A. 402 R.

(18) S. 48—Mortgage by deposit of title deeds—Whether it is something more than a mere oral agreement or declaration. See MORTGAGE (EQUITABLE), No. 1, 14 B.U.L.R. 211.

(18-a) S. 49—See No. 12, *supra*, and Nos. 13, 14 and 15 also.

(19) S. 50—Mortgage—Sale of property comprised in an unregistered mortgage—Liability of purchaser—Notice.

Registration Act (III of 1877)—(Concluded).

Property was purchased, which was the subject of an unregistered mortgage, the registration of which was not compulsory. The purchaser had no notice of the mortgage at the time of execution of the sale-deed in his favour, but received notice before the sale-deed was registered. *Held* that the mortgage was binding on the purchaser. **Khiuli Ram v. Himmata**, A.W.N. (1908), 99 = 80 A. 238 = 5 A.L.J. 607.

KNOX, J.

References:—19 A. 145; 25 A. 366, *applied*.

(20)—S. 50, does not protect a purchaser who purchased with knowledge of an unregistered incumbrance—Pre-emptor no better than an ordinary vendee. See PRE-EMPTION, No. 6, 5 A.L.J. 112.

(20-a) S. 50—See No. 16, *supra*.

(21)—S. 51—Release by co-sharers in a permanent tenure to one among themselves—Registration—Stamp. See ACT VIII of 1885 (TENANCY, BENGAL), No. 3, 12 C.W.N. 478.

(21-a) Ss. 51, 89—Sale certificate granted under S. 316, C.P.C.—Copy of certificate registered under S. 89, Registration Act—Sale certificate not a registered document, under Art. 10, Limitation Act, 1877. See LIMITATION ACT, No. 40, 142 P.R. 1908 (F.B.)

(22) S. 73—See No. 17, *supra*.

(23) S. 74—See No. 17, *supra*.

(24) S. 76—See No. 17, *supra*.

(25) S. 77—See No. 17, *supra*.

(26) S. 89—See No. 21-a, *supra*.

Reg. VIII of 1793 (Bengal Decennial Settlement).

(1) S. 51—Valid notice, contents of—Undivided taluk—Joint settlement—Separate collection—Assessment—Measurement—Separate tenancy—Declaratory decree—Liability of taluk to enhancement, not in issue.

A talukdar is entitled to a notice of demand for enhancement of rent under S. 51 of the Bengal Decennial Settlement Regulation (VIII of 1793). The notice should contain one of the grounds mentioned in the said section; a notice not containing any such ground is bad in law.

A declaratory decree declaring a talukdar's tenure liable to enhancement should not be passed, where the question of the liability to enhancement of the taluk as a dependent taluk under the provisions of S. 51 of the Bengal

Reg. VIII of 1793 (Bengal Decennial Settlement)—(Concluded).

Decennial Settlement Regulation was not put in issue.

A taluk was situated within three zemindaries. The settlement of it was a joint one, but the collection was separate. The proprietors of two of the zemindaries caused the entire taluk to be measured, assessed with rent upon the area found therein, and granted a *dowl* to the holders of the taluk, who agreed to pay their share of rent thus assessed;

Held per Mitter, J.—That, the effect of the *dowl* was to constitute the fractional share of the undivided taluk a separate and distinct tenure with which the proprietor of the remaining zemindary had no concern. Hence in a suit for enhancement of rent of a taluk by the zemindar, the proprietor of the remaining zemindary was not a necessary party. **The Bank of Hindustan, China and Japan, Ltd. v. Babu Shib Doyal Tewary**, 8 C.L.J. 329.

BIRCH AND MITTER, JJ.

Reg. XIX of 1793.

—Grant—Sale under Act XI of 1859—Suit by purchaser for recovery of possession or for assessment of rent and mesne profits. See GRANT, No. 1, 35 C. 931.

Reg. XXXV of 1793.

Capability of land to be resumed by Government under, whether sufficient to make it revenue-free within S. 78, Land Registration Act. See ACT VII of 1876 (BENGAL LAND REGISTRATION), No. 2, 8 C.L.J. 523.

Reg. V of 1804 (Madras).

(1) S. 30—Rules made under. See ACT IV of 1899 (COURT OF WARDS), No. 1, 4 M.L.T. 321.

Reg. XVII of 1806 (Bengal Land Redemption and Foreclosure).

(1) Mortgage in possession—Application for foreclosure of mortgage—Limitation. See MORTGAGE (FORECLOSURE), No. 5, 57 P.R. 1908.

(2) S. 8—Stipulated period, meaning of—Application of regulation. See MORTGAGE (FORECLOSURE), No. 3, 70 P.R. 1907 = 38 P.L.R. 1908.

Reg. XX of 1817.

—whether obliges *Daroga* to keep register of *Chowkidari chakran lands*. See EVIDENCE ACT, No. 9, 13 C.W.N. 71.

Reg. II of 1819.

Milkhat property, released after proceedings held under Regulation, covered by entry in Collectorate register of revenue-free estates—Ordinary *milkhat* property not so registered—Distinction—Applicability of S. 76, Bengal Act VII of 1876, to such estates. See ACT VII of 1876 (LAND REGISTRATION), No. 5, 35 C. 747.

Reg. VIII of 1819 (Putni)

(1) S. 6—Putni, share of, without the consent of the Zemindar, effect of—Co-sharer landlords collecting share of rent separately, if constitutes separate tenancy—Sale in execution of decree for share of rent, effect of.

A purchaser of a share of a *putni* acquires a valid title in the property although his purchase was not recognised by the Zemindar. He is not exempted from liability for rent jointly with the transferee, if the landlord chooses to recognise him as one of the joint-holders of the *putni*. S. 6 of the Putni Regulation only prevents any splitting of the tenure and apportionment of the rent without the sanction of the landlord (a).

One of the co-sharers, in the Zemindari who had a 5 annas interest brought a suit for his share of the rent against the registered *putnidar* and obtained a decree, in execution of which, he sold a 5 annas interest in the *putni*.

Held, that the effect of the sale was precisely the same as that of a sale under a money-decree, that is, the right, title and interest of the judgment debtor at the time of the attachment passed (b).

No separate tenancy is constituted under a co-share; landlord merely by his collecting his share of the rent separately from the tenant. **Aosub Ali Pramanik v. Bisseshuri**, 8 C.L.J. 554.

PARMEYER AND MOOKERJEE, JJ.

References.—(a) 26 C. 103, F.; 11 W.R. 294, D. (b) 20 W.R. 275, D.

(2) S. 13, cl. 4—Durpatnidar's lien, if superior to landlord's charge. See LANDLORD AND TENANT, No. 18, 7 C.L.J. 652.

(3) Ss. 13 and 14, Cl. 4—Under-tenure-holder making deposit—Suit for possession, if necessary—Lien, when extinguished—Statutory lien—Contract how revived—Hypothec—Silence—Statement by *putnidar*, who has no interest, if binds transferee.

Per Stephen, J.—A special suit to declare the lien, created by S. 13, Cl. 4 of the Putni

Reg. VIII of 1819 (Putni)—(Continued).

Regulation, terminated by satisfaction of the debt is unnecessary, when the plea of suit is set up as a reply to a claim for rent and the defendant uses it only as a basis for resisting that claim.

The creation of a *grihi* estate is a formal act both according to the language of Reg. VIII of 1819, S. 11, and according to universal practice and cannot be inferred from the conduct of parties.

When a contract has terminated, it cannot be revived unless by the incorporation of its terms in a new one.

Per Mooherrjee, J.—The under-tenure-holder who makes the deposit under S. 13, Cl. 1 of Putni Regulation is entitled to remain in possession only so long as the full amount advanced, with interest, is not realized from the usufruct of the tenure. If, after his debt has been satisfied, he does continue in occupation, he does so at his peril and renders himself liable to account for the profits received in excess. His position is analogous to that of a mortgagee in possession who stays on the premises after his dues have been satisfied.

The lien is extinguished by satisfaction of the debt from the profits of the tenure. No order of the Collector is necessary in this behalf, nor his recourse to a regular suit essential to alter the legal position of the parties. The moment the lien is extinguished, the defaulter becomes entitled to recover possession.

S. 13, Cl. 1 of the Putni Regulation makes it a condition precedent to the creation of the lien that the amount lodged should be advanced from private funds and should be paid by the tenure-holder after he had already paid the whole of the rent due from himself.

The lien in question is (a) creation of the Statute and statutory lien cannot be created by consent, the provision of the law must be strictly complied with before reliance can be placed upon the lien.

A mere treatment of the under-tenure-holder by the landlord as a usufructuary encumbrancer is not sufficient to create the statutory lien.

A statement in the plaint, unchallenged and made by the plaintiff after his interest has been transferred is in no way binding upon the transferee (a).

Reg. VIII of 1819 (Putni)—(Concluded).

When silence is of such a character and under such circumstances that it would be a fraud upon the other party, for the party which has kept silence to deny what his silence has induced, it will operate as an estoppel. **Jakhomuli Mehara v Saroda Prosad Dey**, 7 C.L.J. 601.

STEPHEN AND MOOKERJEE, JJ.

Reference (a) 1 C.L.J. 23=32 C. 357, R.

Reg. XI of 1825 (Bengal Alluvion and Diluvion)

(1) S. 4, cl. 1—*Admissibility*—*Dastak*—*Registration Act (III of 1877)*, S. 17, cl. (d)—*Non-occupancy raiyat*—*Accretion*.

An unregistered *dastak* which merely allows the plaintiff to take possession of the land and to cultivate it, is not a lease for any term exceeding one year or a lease from year to year or a lease reserving a yearly rent, within the meaning of cl. (d) of S. 17 of the Registration Act, and is, therefore, admissible in evidence.

A non-occupancy raiyat can claim a newly-formed land as an accretion to his holding under cl. (1) S. 4 of Reg. XI of 1825 (a) **Ahmed Bepari v Toki Mahomed**, 8 C.L.J. 538.

PRUD'HOM AND BANERJEE, JJ.

Reference —(a) 16 W.R. 95, R.

(2) S. 4, cl. (1) *Non-occupancy raiyat*—*Accretion*.

A non-occupancy tenant can acquire a right to hold a newly-formed land as an accretion to his holding under cl. (1) of S. 4 of Regulation XI of 1825 (a) **Amjad Ali v. Kaderjan Bibi**, 8 C.L.J. 537.

STEPHEN AND DOSS, JJ.

References —(a) 8 C.L.J. 538, R., 4 W.R. 57, 1 C.L.J. 63, 33 C. 444, D.

(3) S. 4, cl. 1—*Non-occupancy raiyat*—*Accretion*—*Terms of holding accreted land*.

S. 4, cl. (1) of Reg. XI of 1825 applies to the case of a person who is not an occupancy raiyat (a).

The person to whose land the accretion is formed is entitled to hold the accreted land on the same terms as that by which the land to which it is an accretion is held (b). **Miajan v Akram Ali Bhuiya**, 8 C.L.J. 541.

GLIND, J.

References —(a) 4 C.L.J. 63, 33 C. 144, *Ex pl.* (b) 21 C. 233, F.

Reg. II of 1827.

S. 56—*Pleader—Misconduct—Disciplinary jurisdiction—High Court.*

Pleaders are a privileged class enrolled for the purpose of rendering assistance to the Courts in the administration of justice. Their position, training and practice, give them influence with the public, and it is directly contrary to their duty to use that influence for the purpose of bringing the administration of justice into contempt.

A pleader, presiding at a public meeting and procuring the passing thereof of a resolution contemptuously denouncing, or protesting against the conduct of a Judge of the High Court in passing sentence at a trial at the criminal Sessions, is guilty of misbehaviour under S. 56 of the Regulation II of 1827. **Government Pleader v. Jagannath M. Samant**, 10 Bom. L. R. 1169.

BASIL SCOTT, C.J. AND BAICHILOR, J.

Reg. VIII of 1827.

Certificate of heirship under—Effect See WILL, No. 3, 1 Sind L. R. 196

Reg. III of 1872.

Ss. 5 and 8—Suit instituted before Settlement Office under Regulation without Court-fee—Suit transferred to Civil Court Institution Court-fee whether necessary. See COURT FEE, No. 2, 12 C.W.N. 917.

Reg VII of 1882.

S. 10, cls. 3, 4, 5, 7 and 8—Tanki-tenure, nature of settlement of—Origin and incidents of such tenure—Liability of entire village to be sold on default, so as to destroy the rights of all the tenure-holders. See LANDLORD AND TENANT, No. 15, 7 C.L.J. 460.

Reg III of 1891.

(1) *Jhum cultivation—Legislation to extinguish right to carry on such cultivation outside settled estate—Compensation—Onus to prove that statute applies—Statement of facts in preamble of statute—Value—Question of fact or law—Concurrent findings—Evidence Act (I of 1872), S. 13—Transactions inter alios*

Reg. III of 1891 when applied to any lands would have the effect of confiscating proprietary rights and giving compensation in exchange. The onus therefore lies on Government to show, that the facts of any case are such as to bring it within its operation. The Government must

Reg. III of 1891—(Concluded).

prove that at the Permanent Settlement, the Officers of the Government included amongst the assets of the estate, income derived by its owners from *jhum* cultivation carried on beyond the limits of the estate.

The argument, that under the Regulations then in force no assets not arising out of the estate could be lawfully taken into account, and that a strong presumption was thus raised that the course which was in accordance with law was followed in a particular case, was not entertained in the face of the preamble to the Regulation which shows that in a number of cases the income of *jhum* cultivation carried on beyond the estate was rightly or wrongly taken into account.

It was proved that as early as 1837, the owners of the estate received *kabuliyats* from tenants carrying on *jhum* cultivation on the disputed land, that in 1812 and 1813 they succeeded in defeating an attempt on the part of persons interested in the adjoining *mouzzah* to exercise rights over the land, and that on several occasions they successfully resisted proposals on the part of the Revenue authorities to settle portions of the land as *slam* land, open for settlement.

Held, that from this and other evidence of continuous possession and enjoyment, it should be inferred that the land was included within the permanently settled estate of the owners, and the Regulation had no application to it.

The question here was in one sense a question of fact, but every point in this process of the reasoning involved considerations of law, and thus although the findings of the Courts in India were concurrent, the Judicial Committee could review such findings in appeal. **Mahomed Ali Haidar Khan v Secretary of State for India in Council**, 12 C.W.N. 1095 (P.C.) 4 M.L.T. 234—10 Bom. L.R. 1101—8 C.L.J. 196—P.T.R. 1908 Journal parts, p. 110

LORD ROBERTSON, LORD ATKINSON, LORD COLLINGS, SIR ANDREW SCOBLE AND SIR ARTHUR WILSON.

Release.

(1)—by co-sharer, if transfer—Stamp—Registration. See ACT VIII OF 1885 (TENANCY, BENGAL), No. 3, 12 C.W.N. 478.

(2) Document whereunder executant relinquishes his rights over certain property of his, but receives specific amount for bargain, is not

Release—(Concluded).

—, but conveyance. See **STAMP ACT** (II OF 1899), No. 12, 10 Bom. L.R. 730.

(3) Release by a co-parcener—Right of the co-parcener's son then in existence to recover his share in the family property—Right of an after-born son, in the property. See **HINDU LAW** (JOINT FAMILY), No. 13, 10 Bom. L.R. 778.

(4) Whether a release by an alleged reversioner, recognising a widow's right of absolute ownership under her husband's will, can be set aside as being transfer of *spes successionis*, within S. 6 (a), Transfer of Property Act. See **TRANSFER OF PROPERTY ACT** No. 4, 18 M.L.J. 469.

Relief.

(1) Persons against whom no relief is claimed, suit not liable to be dismissed under S. 85, Transfer of Property Act, for non-joinder of Relief afforded to plaintiffs in such cases. See **TRANSFER OF PROPERTY ACT**, No. 47, 31 M. 333.

Religious Association.

(1) Government sanction if necessary to legalise—Exclusive right of worship Whether Crown is a necessary party in suit relating to mosque—Court's power to settle a scheme of management of trust. See **MAHOMEDAN LAW** (WAKF), No. 4, 13 C.W.N. 26.

(2) Suit by some of the subscribers of a religious and charitable society—Advocate-General consent or sanction, not obtained—S. 539, Civ. Pro. Code. See **CIV. PRO. CODE**, No. 292, 4 M.L.T. 345.

Religious Endowments.

(1) Shebait, trespass by—Mesne profits, liability of idol for—Shebait's position—Representation of idol.

Where a decree from mesne profits, following a previous decree for recovery of possession of immoveable property, was passed against one P he was described therein as "Shebait."

Held, that the decree should be taken as made against the idol, the suit having been defended on behalf of the idol and for its benefit.

The position of a shebait as representing an idol discussed. **Raja Pramada Nath Ray v. Shebait Purno Chandra Roy**, 12 C.W.N. 550 = 7 C.L.J. 514.

MACLEAN, C.J. AND DOSS, J.

Religious Endowments—(Continued).

(2) *Hindu Law*—Debutter—Hereditary shebaitship—Shebaitship, validity of disposal by will—Usage—Family custom.

Held by **Maclean, C.J. and Mitra, J.**—In the absence of any local usage or family custom, and where no case of necessity or clear benefit to the idol has been made out, a shebait of a private debutter is not entitled to dispose of his office of hereditary shebaitship by his will (a).

Held by **Woodroffe, J.**—That the question of usage did not affect the matter, and that the office of shebaitship could not be alienated by will. **Rajeshwar Mullick v. Gopenwar Mullick**, 12 C.W.N. 323 = 35 C. 226 = 7 C.L.J. 315.

MACLEAN, C.J., MITRA AND WOODROFFE, JJ.

Reference —(a) 6 B. 298, Diss.

(3) Debt incurred by deceased manager of mutt—Liability of successor to pay off amount from the income of the mutt, property—Necessity for creation of a charge by the deceased manager.

Where a debt was incurred by the defendant's predecessor in office as manager of mutt, for purposes necessary for the maintenance of the institution, a decree limiting the liability of the estate to the income of the mutt may be validly passed, although the debt was not made a charge on the estate by the deceased manager, in the same manner as the estate of an infant may be liable for a contract by the guardian without any express charge over the estate having been given. **Nataraja Desai v. Noor Mahomed Rowthen**, 17 M.L.J. 553 = 3 M.L.T. 95 = 31 M. 47.

WHITE, C.J. AND MILLER, J.

References —27 M. 435; 4 I.A. 52 (P.C.); 17 M. 106, 20 B. 61, R.

(4) Suit for removal of mahant of a religious institution—Right of villagers to interfere—Proof of custom—Circumstances justify. ing mahant's removal.

In a suit for the removal of the mahant of a religious institution, which was supported by village land, the villagers cannot, in the absence of any customary right to that effect, have any power as to the appointment or removal of the mahant. In such a suit where the allegation against a mahant was that he was of an undesirable character, that he stirred up false cases, that he misappropriated the proceeds from the land and that he allowed the buildings to fall into disrepair, &c., and the evidence

Religious Endowments—(Continued)

failed to establish any such charge, and there was no charge against the mahant of gross immorality or even of waste by alienation of the land, held, under such circumstances, the mahant could not be removed **Bhagwan Das v. Hardit Singh**, 7 P.R. 1908 (Footnote at p. 63) = 21 P.W.R. 1908 = 108 P.L.R. 1908

ROBERTSON AND KENSINGTON, JJ

- (5) *Mutuali, whether infant can be appointed*
—*Waiver—Civil Procedure Code (XIV of 1882), S. 44 (a), leave under.*

The power to appoint a *mutuali* is a power in the nature of a trust. The power to appoint a new *mutuali* stands on the same ground as the power to appoint new trustees in England.

A person who is below the age of puberty cannot be appointed *mutuali* (a)

In a suit by a purchaser for a declaratory decree where a *wakf* is set up by the defendant who claims the land as the *mutuali* but fails to establish his title, if the plaintiff has made out a *prima facie* title, he is entitled to a declaration of his title and an injunction (b)

Section 44 (a) of the Code of Civil Procedure substantially follows one of the rules (O XVIII, r. 2) of the Supreme Court in England and was intended for the protection of the defendant. The defendant may by his conduct waive the benefit of that rule (c). **Satish Chandra Mullick v. Ashruffudin Ahmad**, 8 C.L.J. 196

FRITCHER, J

References —(a) 19 C. 203 (219), *l.* (b) 20 C. 834, *l.* (c) 23 T.L.R. 570 (C.A.), *l.*

- (6) *Absolute sale or gift in favour of temple*
—*Power to appoint manager of land—Deed in donor's custody—Effect—Construction of deed* *Subsequent conduct of parties.*

Where a deed is in terms an absolute sale or gift in favour of the temple, the fact that the donor is permitted to retain the instrument cannot be taken as sufficient to show that he also retained the ownership of the land. And where the deed is clear, the evidence of the subsequent conduct of the parties, many years after its execution, cannot assist in construing its language or terms. A person making over the land absolutely to the temple has no power to give any other person any right of management of it. **Krishna Pillai v. Arunachella Chettiar**, 18 M.L.J. 304.

MILLER AND MUNRO, JJ.

Religious Endowments—(Continued).

- (7) *Shebaitship—Mohunth—Transfer, power of—Superior and subordinate Mutt, relation of—Election of Mohunth—Custom governing Mutt—Conditional device giving possession till a Mohunth is duly installed, if to be passed*

A *Mohunth* of a mutt cannot transfer the right of management vested in him, though coupled with the obligation to manage in conformity with the trust annexed thereto (a).

Where one mutt is subordinate to another in the sense that the latter has the right of nomination of the *Mohunth* of the former, the *Mohunth* of the former mutt cannot by a deed of transfer alienate his rights in favour of the *Mohunth* of his superior mutt.

There is no fixed rule which regulates the relation between a superior and a subordinate mutt, even if a mutt is subordinate to another, it must be governed by its own rules of management (b)

In the case of mutts, the custom governing the particular establishment has to be proved (c)

In the case of mutts, there is no uniform custom applicable to all mutts so far as the question of succession to the office of *Mohunth* is concerned (d)

In cases in which a *Mohunth* is allowed by custom to nominate his successor by word of mouth or by a will, such nomination is subject to the confirmation of the entire body of *Sanyasis* of different mutts who are invited to be present at the ceremony of installation when the new *Mohunth* is invested with *Chudder* or the robe of office.

When no custom is proved and no authority in the outgoing *Mohunth* to make a nomination is established, the *Mohunth* should be elected by all the *Sanyasis* of the institution (e)

Where the plaintiff has not asked for declaration of his rights to nominate a *Mohunth* for another mutt, nor in the plaint stated precisely the nature of the relations between the two mutts but claimed title in himself on the basis of the *Supardanama* (which created no valid title in him in the disputed properties), he cannot, at the appellate stage of the case, be permitted to turn round and say that he is entitled to have a decree for administration, to recover possession of the disputed properties and to keep such possession till a *Mohunth* has been appointed (f). **Prayad Das v. Mohunth Kriparam**, 8 C.L.J. 499.

MOORHOUSE, J.

Religious Endowments—(Concluded).

References—(a) (1) 4 I.A. 76, (2) 23 M. 271 = 27 I.A. 69, R. (b) (3) 20 W.R. 217 (P.C.). (4) 10 M. 375, R. (c) (5) 11 M.L.A. 405, (6) 9 C. 766 = 10 I.A. 32 = 13 C.L.R. 30, (7) 1 Mac. I.A. 209, R. (d) (8) 27 M. 435 (457), R. (e) (1) 1 A. 539, (2) 7 C.W.N. 145, R. (f) (3) 14 M. 1, D.

(8) Sale of immoveable property of a religious institution by its Mohant—Suit to recover it by his successor—Trustee—Limitation. See LIMITATION ACT, No. 15, 123 P.W.R. 1908 (F B).

(9) Suit for removal of a mutwahi of a mosque—Power of congregation of the mosque as regards removal of mutwahi—Change of religion—Sufficient cause. See LIMITATION ACT, No. 36, 37 P.W.R. 1908.

(10) Alienation of property belonging to religious institution—Suit to recover possession of the property with mesne profits—Limitation—Joinder of causes of action. See LIMITATION ACT, No. 104, 35 P.W.R. 1908.

(11) Whether destruction of image destroys the endowment. See HINDU LAW (INHERITANCE), No. 5, 8 C.L.J. 369.

(12) Right of management of, by members in rotation. See HINDU LAW (JOINT FAMILY), No. 15, 4 M.L.J. 486.

Religious Endowments Act.

See ACT XX OF 1863.

Religious practice

Custom of worship opposed to religious doctrine—Effect. See HINDU TEMPLE, No. 1, 12 C.W.N. 946.

Relinquishment.

(1) *Joint Hindu family—Sons' interest in a tenant's holding of the father—Relinquishment by father without sons' consent, validity of.*

Held, that Hindu sons living jointly with their father are not the co-tenants of his holding.

Held, further, that a relinquishment of his holding made by the father without the consent of his sons is perfectly valid (a) **Sarabjit Singh v. Mohan Singh**, 11 O.C. 292.

PILLAI, J.J.

Reference—(a) 10 O.C. 235, R.

Remand.

(1) Order of not a final decree. See CIV. PRO. CODE, No. 322, 52 P.L. 1907 = 31 P.J.R. 1908.

Remand—(Continued).

(2) Order of—Appealability to Privy Council. See CIV. PRO. CODE, No. 347, A.W.N. (1907), 291.

(3) Suit for partition—Appellate Court deciding the shares and remanding the suit to lower Court to carry out partition—Erroneous description of the order as order of remand under S. 562, C.P.C.—Appeal—Court fee. See APPEAL, (GENERAL), No. 3, A.W.N. (1908), 40.

(4) Whether appeal lies from an order of—after decision of the suit in compliance with the order. See CIV. PRO. CODE, No. 314, A.W.N. (1908), 76.

(5) Order of, by appellate Court—if "final decree". See CIV. PRO. CODE, No. 342/343, 12 C.W.N. 345.

(6) Involving the taking of fresh evidence ordered—Practice of Mofussil Court—First Court to take evidence there—District Court empowered by order of remand to take any evidence it may think necessary. See TRANSFER OF PROPERTY ACT, No. 80, 10 Bom. L.R. 546.

(7) Dismissal of a suit on a preliminary point—Power of Appellate Court to remand the case. See CIV. PRO. CODE, No. 311, 56 P.R. 1908.

(8) Order of remand which will not necessarily have any effect on the ultimate decision of the case—Whether final order within the meaning of S. 595 C.P.C. See CIV. PRO. CODE, No. 322-a, 11 O.C. 169.

(9) What is a preliminary point—Liability for compensation—Amount of compensation. See CIV. PRO. CODE, No. 315, 8 C.L.J. 159.

(10) Declaratory suit relating to two pieces of land dismissed *in toto* by first Court upon preliminary point—Appellate Court dismissing suit as to one piece, and remanding case as to the other piece—Inapplicability of CIV. PRO. CODE, S. 562—Illegality of order. See APPEAL, (GENERAL), No. 3-d, 149 P.W.R. 1908.

(11) to lower Appellate Court—Appellant not entitled to notice—Date of hearing on remand. See PRACTICE, No. 13, 4 N.L.J. 166.

(12) Order of remand if judgment. See CHARTER ACT, No. 1, 13 C.W.N. 165.

(13) Illegal—Effect upon subsequent proceedings. See CIV. PRO. CODE, No. 318, 4 M.J.T. 479.

(14) On appeal from Commissioner of Insolvency. See VAKIL, No. 1, 18 M.L.J. 565.

Remand—(Concluded).

(15) Order of remand under S. 562, Civ. Pro. Code, 1882, passed by a single Judge of the High Court—Whether “judgment”—Letters Patent, S. 15—Appeal. See CIV. PRO. CODE, No. 315-a, 35 C. 1096.

(16) Appellate Court, whether has power to remand a case for second decision except as provided by S. 562, Civ. Pro. Code (1882). See CIV. PRO. CODE, No. 317-b, 138 P. R. 1908.

Re-marriage.

Effect of—of Hindu mother on her position as guardian of her minor son. See HINDU LAW (GUARDIANSHIP), No. 1, 1 N. L. R. 20.

—See WIDOW RE-MARRIAGE.

Rent

(1) Judgment in civil suit for—Merged of cause of action for rent under Rent Recovery Act. See ACT VIII OF 1865 (MADRAS RENT RECOVERY) No. 1, 17 M. L. J. 411.

(2) Suit to recover arrears of provisions and phraseology of S. 193 of the Bengal Tenancy Act—Applicability to suits to recover sums that are not rent. See ACT VIII OF 1885 (BENGAL), No. 21, 7 C. L. J. 152.

(3) Proceeding under Land Acquisition Act—Whether abatement of rent can be made without the consent of the parties. See COMPENSATION, No. 1, 7 C. L. J. 284.

(4) Suit for—suit to recover fractional share of rent—separate collection. See LANDLORD AND TENANT, No. 12, 7 C. L. J. 512.

(5) Enhancement of rent of Talukdar—Contents of notice. See REG. VIII OF 1793 (BENGAL DEFNAM SETTLEMENT), No. 1, 8 C. L. J. 329.

(6) Value of rent suit, under Bengal Tenancy Act, for purposes of appeal. See ACT VIII OF 1885 (BENGAL TENANCY), No. 26, 12 C. W. N. 448.

Rent Act.

(1) See ACT XII OF 1881 (N. W. P.).

(2) See ACT XXII OF 1886 (ORISSA).

Rent Recovery Act.

(1) See ACT X OF 1859 (BENGAL).

(2) See ACT VIII OF 1865 (BENGAL).

(3) See ACT VIII OF 1865 (MADRAS).

Reply to Notice.

Whether action for libel or slander will lie against accused persons defending themselves—Whether and when reply to notices of action are privileged—Whether such action will lie

Reply to Notice—(Concluded).

against judges, counsel, witnesses, or parties for words written or spoken during proceeding before Court or legal tribunal. See TORT, No. 4, 18 M. L. J. 953.

Representation

Right of in cases of collateral succession. See CUSTOMS (PUNJAB—INHERITANCE AND SUCCESSION), No. 31, 140 P. R. 1908.

Representative

(1) Scope of word—whether person for whom predecessor of judgment-debtors was benamidar and who is really interested in protecting property is a—within S. 244, Civ. Pro. Code. See CIV. PRO. CODE, No. 138, 7 C. L. J. 209.

(2) Purchaser at Court auction who did not purchase from the decree-holder, whether representative of decree-holder. See CIV. PRO. CODE, No. 141, 3 M. L. J. 30.

(3) Auction purchaser is representative of judgment-debtor, not of decree-holder. See CIV. PRO. CODE, No. 207, A. W. N. (1908), 157.

(4) Mortgagee under the judgment-debtor, whether representative of the judgment-debtor. See CIV. PRO. CODE, No. 115, 4 M. L. J. 85.

(5) Purchaser at an auction held in execution of a decree against the unregistered transferee of an occupancy holding is a representative of the recorded tenant—Right to apply for setting aside sale in execution of rent decree against the recorded tenant on the ground of fraud. See CIV. PRO. CODE, No. 117, 8 C. L. J. 327.

Repudiation.

Deed of—executed by husband transferring wife to another subsequently revoked effect of. See MARRIAGE, No. 2, 31 P. R. 1908.

Re-purchase

—, pre-emption is not a right of. See PRE-EMPTION, No. 6, 5 A. L. J. 112.

Rescission

—of contract—Non-completion of contract for ten months—Return of deposit—Presumption of. See CONTRACT ACT, No. 21, 1 A. L. J. 778.

Res judicata.

(1) S. 13, *Explan. II*, Civ. Pro. Code—Former suit based on allegation that plaintiff was owner by purchase—Dismissal of suit—Subsequent suit for possession by him as heir.

Explan. II to S. 13 merely explains a matter directly and substantially in issue in a suit

Res judicata—(Continued)

but it does not dispense with the necessity of finding, in a particular case, the other equally essential requirements of the section, such as that the parties were litigating under the same title and that the matter in issue was finally heard and decided. So, where the former suit brought by a person was based on an allegation that he was owner of the land then sued for by reason of his purchase, the dismissal of that suit is not *res judicata* in a subsequent suit brought by him for possession of the same land on the ground that he was entitled thereto, not as owner, but as lien to the last male owner. Under such circumstances, the plaintiff could not have included such inconsistent claims in one plaint in the former suit without creating confusion. **Chiragh Din v Nizam Din**, 55 P R 1907-96 P.W.R. 1907-65 P.J.R. 1908

LAL CHAND, J

References—146 P R 1890, 26 M 760 27 M. 102, 28 C 17, 24 C. 711, R. 4 P R 1889, 4 P.R.1903, 39 P R. 1881, 142 P.R. 1881, 96 P R. 1881, 116 P.R. 1890, 63 P R 1896, 100 P R. 1898, 19 A 517; 20 C. 74, 20 A 81; 20 A 516, D.

(2) *Civ. Pro. Code, S. 13, Explan. 2—Agra Tenancy Act (II of 1901), Ss. 161 and 165—Suit for profits—Mode of collection*

A suit for profits by one co-sharer against another was dismissed in 1905 by the Assistant Collector as barred by the rule of *res judicata*. This decision was reversed by the District Judge who remanded the case under S. 562, Civ. Pro. Code. The decision of the District Judge was affirmed on appeal by the High Court. In second appeal, after remand, the plea of *res judicata* was again put forward, based upon certain decisions of the High Court, barring a second appeal in case of remand, under S. 562, Civ. Pro. Code, under the Tenancy Act, and also based upon two other decisions between the same parties, which had not been set up on the previous occasion. *Held*, that the decision of the District Judge became final and its effect was not nullified by the decisions subsequently passed as to the right of appeal. As to the other decisions, they, not having been relied upon before the District Judge as a ground of defence, could not be now set up under explan. 2 of S. 13, Civ. Pro. Code. The appellant not only might but ought to have relied upon those decisions in the previous litigation.

In a suit under S. 164 of the Tenancy Act, only the actual collections, made by the defend-

Res judicata—(Continued).

ant, are to be taken into account in determining the amount of profits due. In a suit like the present, a plaintiff is not entitled to have profits calculated on what might have been collected on the rates paid by tenants in other *khewates*, for lands of the same kind.

This constitutes the distinction between a suit of this nature and one under S. 165, Tenancy Act. **Abdul Rashid v. Abdul Latif**, 5 A.L.J. 117—A.W.N. (1908), 68.

AKMAN AND KARAMAT HUSAIN, JJ.

(3) *Agreement to undertake expense of litigation in consideration of receiving a share of land in dispute—Suit for cancellation of agreement—Cancellation refused by Court—Subsequent suit by plaintiffs for enforcement of the agreement—Res judicata—Mixed question of law and fact—Civ. Pro. Code, S. 13.*

An agreement was entered into between the plaintiffs and the defendants by which the plaintiffs were appointed the agents of the defendants to institute an appeal on behalf of the defendants at the expense of the plaintiffs themselves, the defendants promising to convey to the plaintiffs half the lands in dispute. The defendants succeeded in the appeal, and then sued for the cancellation of the agreement on the ground that it was not supported by consideration. The suit was decided against the defendants.

The plaintiffs afterwards brought the present suit for the enforcement of the agreement. *Held*, that the judgment in the previous suit, being a decision on a mixed question of law and fact, was a bar to the present suit.

Observations as to how far a decision on a question of law can operate as *res judicata*. **Muazam Shah v. Alam Khan**, 41 P.R. 1908

RATTIGAN AND LAL CHAND, JJ.

References—22 B 669, 14 M. 312, 28 C. 323, 5 M 304, 11 M 393; 28 M. 517, 32 C. 749, 10 C 1087, 1 C.W.N. 687, 26 M 104, 15 A. 327, 55 P.R. 1896, 92 P.R. 1902 (F B), 28 C. 318, R.

(4) *Suit for redemption decreed—Subsequent suit for recovery of the amount not taken into account—Transfer of Property Act (IV of 1882), Ss. 92 and 94.*

In a suit for redemption there ought to be a complete and final settlement of all accounts between the mortgagor and the mortgagee,

Res judicata—(Continued).

right up to the date of the redemption. Where, therefore, a mortgagor obtained a decree for redemption, and paid up the amount found due, and subsequently brought a suit for recovery of the amount, which, he alleged, the mortgagee had collected during the time he was in possession, and which was not taken into account in the previous suit, *held* that the suit was barred **Kashi Pershad v. Bajrang Pershad**, 4 A.L.J. 763 A.W.N. (1907), 281-30 A 36

RICHARDS, J.

- (5) *Finding of lower Court on an issue which is not dealt with in appeal, whether—*

The finding of a lower Court, on an issue which is not dealt with in the Court of appeal is no more *res judicata* than if the finding were reversed **Jiwanmal wd Tharomal v. Radhomal Tharomal and another** 1 Sind L.R. 171

FRUIT AND GROUCH, JJ.

Reference—6 P 110, R

- (6) *Application of principle of res judicata to execution proceedings.*

Although the use of the expression "*Res judicata*" in the case of execution proceedings is not strictly correct, orders in execution proceedings are governed by principles analogous to those of *res judicata* and are binding, if not appealed against, in subsequent proceedings in the same suit. Their binding force depends not upon S. 13, Civ. Pro. Code, but upon general principles of law **Ibrahim Bambala v. Imfah Din**, U.B.R. (1907), Civ. Procedure, 1 14 Bur. L.R. 35

SHAW, J.

References—3 A. 141, 173, 6 A. 269, 8 C. 51, 11 L.A. 181, U.B.R. (1897-01), II, 252, R

- (7) *Practice of first examining defendant as a witness disapproved—Civ. Pro. Code. Ss. 13, 179 and 180—Indian Evidence Act (I of 1872), Ss. 21, 92, 137 and 138—Pro note—Liability under it of a person not a party to it—Practice—Examination of witnesses—Interest on amount decreed and costs allowed—Judge prohibited from receiving private communication from a party to suit*

The plaintiff sued D. 1, the husband and D. 2, the wife, for recovery of the amount due on a pro-note and cheque alleged to have been signed respectively by D. 1 and J, the brother

Res judicata—(Continued).

of D. 2, in payment of certain accounts due to him on building agreement. Before the institution of the present suit, plaintiff filed a suit on the whole account in which the amount of both these documents were included. That suit was dismissed on the ground that the plaintiff, having taken from D. 1, a pro-note in settlement of the account had no longer a cause of action on the account itself

Defendant 1 denied execution of the pro-note sued on, alleging that his signature was forged

The plaintiff, on the contrary, alleged the documents to be perfectly genuine, and, as regards the pro-note executed by D. 1, sought to make D. 2 also liable on the allegation that it was signed for D. 2 by her husband D. 1, as her duly authorized agent D. 2 denied the allegation

Held (1) that the dismissal either rightly or wrongly of previous suit on the whole account which included the amount of the cheque now sued on operated as *res judicata* under S. 13, Civ. Pro. Code and that on this account, part of the claim which is based on the cheque should fail.

(2) that the evidence did not disclose that there was any such authority given by D. 2 to D. 1 to sign the pro-note as alleged by plaintiff.

Obiter It is extremely doubtful whether any evidence would be admissible to show that D. 1, signed not only as a principal but also as an agent of a principal not named in the pro-note. Both under English Law, and Indian Law (see S. 92 of the Indian Evidence Act), such evidence would be inadmissible.

(3) that the circumstantial evidence proved that the pro-note alleged to have been signed by D. 1 was in fact so signed and genuine.

Practice (4) that it is not only illegal, but improper and unfair for Courts to permit the defendant, at the very outset of the case, to be put in the witness box nominally as plaintiff's witness to be cross-examined in the presence and hearing of the plaintiff, before the plaintiff is even called upon to go into the box and tell his own story. This practice generally prevalent, as it is in the Courts of this province, is much to be deprecated. It is certainly in accord with justice and equity that a party who has to defend a suit should hear what his opponent has to say before he is called upon for

Res judicata—(Continued).

an answer, and it is only under exceptional circumstances that the opponent should be called at all as witness of the party who may be then putting his case before the Court

(5) that it is improper for a Judge to receive from any party to a suit, private communication in writing as to the special grounds of requiring production of certain documents, which communication is kept concealed from the opposite side

(6) that the following statement of Defendant 2's counsel does not amount to a confession of judgment

"If the pro-note is established and receipt of consideration is proved Mrs. Max Mink does not wish to protract matters by disclaiming liability."

In this case, interest at the rate given in the pro-note sued upon was allowed on the amount decreed and costs from the date of institution of the suit to the date of the decree and further interest at 6 per cent. per annum on this amount till payment **Max Mink v. Shankar Dass**, 116 P.W.R. 1908

CHITTY AND JOHNSTONE, II

(8) *S. 13, Civ. Pro. Code, 1882* Mere filing of an appeal—Effect—Appeal dismissed on ground of limitation alone—Effect—Pendency of proceedings by way of appeal—*English law—Law in India*

The mere filing of an appeal does not vacate or annul the judgment appealed against. A judgment still liable to appeal, which has not yet been appealed from or an appeal which is actually pending, cannot operate as *res judicata* during the interval preceding the appeal or while the appeal is actually pending (a) Where an appellate Court dismisses an appeal on the ground of limitation alone the appellant is not in a better position than one who is heard but fails on the merits. In such a case the decision of the lower Court on the points actually decided binds the parties to the suit (b). In English Law even the pendency of proceedings by way of appeal is no answer to a pleading of estoppel by judgment, though it may be ground for applying for a stay of proceedings (c) For India Explanation IV to S. 13, Civ. Pro. Code (1882), lays down a different rule **Ram Chandra Narain**, 1 N.L.R.

DEAKI BROCKMAN, C

Res judicata—(Continued).

References—(a) 5 C. 246; 1 A. 148, R. (b) 6 B. 110, 7 C. 381, 8 C. 681; 22 B. 216, D. (c) 50 R. R. 534, 31 L.J. Q.B. 81, 57 L.J. Ch. 367, R.

(9) *Whether it bars any proceedings by general principle or only by special enactment—Dismissal of first application for maintenance—Whether it is a bar to second application on same facts—Where substantial justice has been done by the lower Court—Whether High Court will interfere in revision—Civ. Pro. Code (Act XIV of 1882) S. 13—Crim. Pro. Code (Act V of 1898), S. 403*

The parties were husband and wife, living apart. The respondent applied to the sub-divisional Magistrate for an order for the applicant to pay an allowance for the support of their child. The Magistrate wrote "Respondent offers to maintain the complainant in a separate house, but she refuses to accept the offer. She alleges no ill-treatment. I have consequently no power to interfere. Case dismissed."

This Magistrate was transferred, and the respondent subsequently applied to his successor for an order of maintenance for the child. The case was duly heard and an order made to pay Rs. 5 per month.

Held on appeal, that *res judicata* does not bar any proceedings by general principle but only by special enactment, as contained in S. 13 of the Civ. Pro. Code, and S. 403 of the Cr. P. C.

Held also that where a Magistrate, to whom an application is made, knows or has reason to believe that a similar application on the same facts has been adjudicated on, he ought not to act on the application without considering the previous decision, but that, when he does so, he is not wrong in law, nor are his proceedings bad and void, regardless of the merits.

Where the second Magistrate has done substantial justice, it is a sufficient reason for refusing to interfere in revision **Maung Po So v. Ma Kyin Mi**, 14 Bur. L. R. 259.

IRWIN, O.C.

Reference—(a) 5 A. 224, D.

(10) *Joint Hindu family—Judgment against Hindu father—Effect—Son not entitled to bring subsequent suit on same cause of action.*

In a joint Hindu family, suits instituted by a father for ancestral property or relating to joint

Res judicata—(Continued).

family business are instituted by him as a manager representing his whole family, and not in his individual capacity as a mere member. So when a Hindu father brings a partition suit for the division of the ancestral property belonging to a joint family, the judgment passed against him in such a suit is binding on his son and bars the son from bringing a subsequent suit for the same purpose, on the plea that he was not a party to the prior suit. **Raman Mal v Hem Raj**, 141 P.R. 1908.

LAL CHAND, J

References—103 P.R. 1873, 68 P.R. 1903, 68 P.R. 1905, R. 10 A 411, 5 B. 685, 14 M I A 367, D.

- (11) C P C., Ss. 13, *Explanation II and 12*—Suit by reversioner in one degree of relationship—Dismissal of suit—Subsequent suit for same relief on another kind of relationship—Subsequent suit, whether barred—Reversioner to state all kinds of relationship in one suit

The plaintiff claimed certain properties as the reversionary heir of one M, basing that claim on the allegation that his father was taken in adoption as a son by M's divided brother. His claim was unsuccessful in the Court of first appeal, and in second appeal to the High Court, he asked permission to allege and prove a different claim as heir to M on another ground, that is to say, as being the grandson of M's sister. The High Court refused permission to do so in that suit and he now sought to do so by this separate suit

Held that, as a plaintiff, who sued as reversioner, was bound by S. 42 to frame a suit in such a manner as to afford ground for a final decision as to his claim as reversioner and to prevent further litigation concerning it and as, in a suit to establish a claim as reversioner, that claim should be held to be the subject in dispute within the meaning of the section, the plaintiff in the former suit ought to have relied upon his descent from M's sister as well as upon the adoption, so that, if proof of the adoption failed, he might still establish his right as reversioner on the ground of this descent and prevent further litigation regarding it and that, therefore, his subsequent suit was barred. **Masilamania Pillai v. Thiruvengadam Pillai**, 31 M. 385

WHITE, C.J., MILLER AND WALLIS, JJ.

Res judicata—(Continued).

References:—26 M. 760 and 29 M. 153, F. 3 M.H.C.R. 320, 7 M.H.C.R. 160, 11 B.L.R. 158, 2 C. 152, 20 C. 79; 25 B. 189, 22 M. 259 and 27 M. 102, R.

- (12) Prior suit on pattah—Inclusion of voluntary fees in pattah—Failure to object to such inclusion—Subsequent suit—Res judicata. See ACT VIII OF 1865 (RENT RECOVERY), No. 2, 17 M L.J. 433.

(13) First suit decided, on a preliminary point—Second suit on a point not decided in the first suit. See CIV. PRO. CODE, No. 38, 10 Bom. L.R. 380

- (14) Landlord and tenant—Order in ejectment—Suit in Civil Court by lessee of tenant. See JURISDICTION OF CIVIL AND REVENUE COURTS, No. 11, 5 A L.J. 30.

(15) Suits for possession of revenue paying land included by mistake in the ejectment decree passed by a revenue Court—Act XVI of 1887 (Tenancy, Punjab), S. 77—C.P.C., S. 13. See JURISDICTION OF CIVIL AND REVENUE COURTS No. 5, 73 P.W.R. 1908

- (16) Identity of subject-matter if essential—How established. See DEBTOR'S ESTATE, No. 1, 12 C.W.N. 739.

(17) between 20 defendants. See HINDU LAW (Widow), No. 20, 5 A.L.J. 367.

- (18) Decision of Court in British India—Whether bars suit in Barar. See CIV. PRO. CODE, No. 10, 4 N.L.R. 61

(19) Rent suit—*ex parte* decree—Plea of payment not raised in that suit—Claim of set off in a subsequent rent suit—Defendant ought to have made it ground of defence in previous suit, but precluded from claiming it in later suit. See CIV. PRO. CODE, No. 31, 12 C.W.N. 862

- (20) Suit for annuity—Defendants denying plaintiffs' title—Previous suit in Revenue Court between same parties for arrears—Decision of Revenue Court operates as *res judicata* on question of title—Defendant estopped from re-opening question—Right of plaintiffs to receive annuity. See CIV. PRO. CODE, No. 15, 5 A L.J. 407.

(21) Issue decided against party embodied in two decrees—Party appealing against one only—Other decree on becoming final operates as—. See CIV. PRO. CODE, No. 18, A.W.N. (1908), 211

Res judicata—(Continued).

(22) Orders in execution proceedings binding on parties in all subsequent proceedings in that suit on principles similar to those of.— See **EXECUTION OF DECREE**, No. 18, 11 O.C. 220.

(23) Suit for assessment of additional rent on same additional area which formed subject-matter of previous suit barred—Previous suit operates as.— See **ACT VIII OF 1885 (BENGAL TENANCY)**, No. 7, 12 C.W.N. 904.

(24) Suit dismissed on an alternative ground, whether *res judicata*. See **CIV. PRO. CODE**, No. 16, 4 M.L.T. 90.

(25) Whether right to redeem is.— See **MORTGAGE (REDEMPTION)**, No. 19, 4 M.L.T. 73.

(26) Decision of questions in former suit, not quite necessary for its determination, not—between same parties in later suit. See **HINDI LAW (WILLS)**, No. 9, 12 C.W.N. 1002.

(27) Dismissal of suit to enforce acceptance of patla by Revenue Court—Subsequent civil suit for recovery of rent on the basis of tender of proper patla. See **MADRAS ACT VIII OF 1865 (RENT RECOVERY)**, No. 1, 17 M.L.J. 601, 3 M.L.T. 186.

(28) Fraudulent transaction upheld by decree of Court—Party precluded from setting up his own fraud. See **FRAUD**, No. 3, 4 M.L.T. 331.

(29) Bond obtained from tenant for non-occupancy and ex-proprietary holding—Application for fixing rent—Bond found to have been obtained by undue influence as to ex-proprietary holding—Subsequent suit for arrears of rent—Whether finding as to undue influence *res judicata*. See **ACT III OF 1901 (N.W.P. AND OUDH LAND REVENUE)**, No. 2, 5 A.L.J. 642.

(30)—See **CIV. PRO. CODE** (S. 13).

(31) Plaintiff declining to proceed with suit—*Res judicata*. See **CIV. PRO. CODE**, No. 20 (a), 198 P.L.R. 1908.

(32) Title set up in present suit whether,—ground of defence which ought to have been made in former suit—Expt. II of S. 13, **CIV. PRO. CODE**. See **CIV. PRO. CODE**, No. 29, 30, 12 C.W.N. 292.

(33)—, plea of, conditions necessary in order to establish—Competency of original Court deciding former suit, not that of appellate Court where suit ultimately decided, to be looked to. See **CIV. PRO. CODE**, No. 13, 12 C.W.N. 359.

Res judicata—(Concluded).

(34) Remission of rent—Previous litigation by the grantee's heirs—Subsequent litigation by the grantee's transferees. See **SANAD**, No. 1, 7 C.L.J. 202.

(35) Plaintiff formerly suing as administrator of estate of deceased—Subsequent suit by him for share in deceased's estate—Former suit dismissed—Subsequent suit whether *res judicata*. See **CIV. PRO. CODE**, No. 33 (a), 14 Bm. L.R. 331.

Respondent.

(1) getting a decree against a co-respondent. See **CIV. PRO. CODE**, No. 202, 4 A.L.J. 772.

Restitution.

(1) First lessee, giving up possession of land to subsequent lessee on receipt of compensation,—such lessee becoming afterwards entitled to restitution of land by a decree of Court—right of such lessee to postpone applying for restitution until mesne profits became sufficient to wipe off compensation money. See **CIV. PRO. CODE**, No. 216, 18 M.L.J. 39.

(2) Conditions under which person can ask for—under S. 583, **CIV. PRO. CODE**. See **CIV. PRO. CODE**, No. 333, 12 C.W.N. 612.

(3) Execution of decree—Effect of reversal on appeal—separate suit, maintainability of. See **CIV. PRO. CODE**, No. 161, 35 C. 265.

Restitution of conjugal rights.

(1) Suit for—Decree declaring wife's rights to future maintenance and residence—Effect of—Whether relief can be claimed in execution proceedings.

In a suit for the restitution of conjugal rights a decree was passed in terms of an award between the parties. It declared the right of the husband to the restitution, and ordered the wife to return to him and live with him. It further declared that the husband should return certain ornaments to her, and it also made provision as to her future maintenance and residence.

Held, that the provisions as to maintenance and residence were merely declaratory; and no relief could be granted to her in execution proceedings. **Musamat Lachmibai v. Kaniamal Asudamal and Kaniamal Asudamal v. Musamat Lachmibai**, 1 Smd. L.R. 184.

PRATT AND HAYWARD, JJ.

Restitution of conjugal rights—(Concluded).

- (2) *Husband deserting and abandoning his wife—Lapse of time—Husband not entitled to claim custody of wife.*

Where it is clearly established that a Hindu husband for years past grossly failed to fulfil the obligations of giving his wife a home and of supporting her and her child, held, in the face of such desertion and abandonment, that the husband is not entitled to come forward and assert his rights as her husband and that a Court is not bound to decree a claim by such husband for custody of his wife. **Dhani v Narain Singh**, 82 P R 1908—147 P.W.R. 1908

KINNINGTON AND RAUTIGAN, JJ

References—78 P R 1893, 95 P R 1898, 28 C. 37, 751, 29 A 222, 11 M L A 551, *relied on*, 25 B 644, 28 M 476, 31 C 79, *It*, 60 P R 1879 (F.B.), *D*.

Revenue Courts.

Variation See LIMITATION ACT, No 5 (a).
9 P W R 1908 (Revenue)

Revenue sale.

Purchase benami See BENAMI TRANSACTIONS,
No 6, 4 M.L.T. 316

Revenue Sale Law

See ACT XI OF 1859.

Reversioner

(1) *Nature and extent of reversioner's interest in ancestral property—whether his interest affected by full owner's crime or absconding* See CRIM. PRO. CODE, No. 1, 19 P W R 1908

(2) *Declaratory suit to set aside declaration Dismissal of suit—Appeal by some only of the plaintiffs—Declaration should be granted only on appellants' right—Reversioners not joining appeal to be excluded* See MAHOMEDAN LAW (EVIDENCE), No 1, 190 P.L.R. 1908

—See HINDU LAW (REVERSIONERS)

—See CUSTOMS (PUNTA)

Review

(1) *Insolvency proceeding—Setting aside of ex parte order* See CIV. PRO. CODE, No 96, 7 C.L.J. 268

(2) *Financial Commissioner's power of reviewing his predecessor's order* See ACT XVII OF 1887 (PUNJAB LAND REVENUE), No 1, 9 P W. R. 1908 (Rev.).

(3)—not necessary when wrong words inadvertently used in judgment in describing

Review—(Concluded).

property in suit—Corrections may be made on application under S. 202 of Civ. Pro. Code. See CIV. PRO. CODE, No. 108 40 P.L.R. 1908.

(4) *The ground for amending a decree on review must be something which existed at the date of the decree.* See CIV. PRO. CODE, No. 361, 4 M.L.T. 86.

(5) See CIV. PRO. CODE, No 94, 35 C. 1023.

(6) *Where question of facts involved legal considerations in every point in the reasoning process, though findings of Indian Courts were concurrent, the Privy Council could review such findings in appeal* See REG. III OF 1891, No 1, 12 C.W.N. 1095

(7) *Power of lower Court to review its wrong order—Civ. Pro. Code, S. 622—Interference by the High Court* See CIV. PRO. CODE, No 355 (b), 31 M 414.

(8)—of judgment, on discovery of new and important matter—Due diligence See CIV. PRO. CODE, No 363-a, 2 Sind L.R. 35

Revision

(1) *Revision—Civil cases Quantum of evidence—Question of fact*

The Chief Court will generally refuse to exercise its powers of revision in civil cases on questions of fact, when there is evidence on record which the lower Court has considered. It cannot be said that the lower appellate Court has committed a material irregularity merely because it may possibly have come to a wrong conclusion in weighing the evidence. **Aya Ram v Karm Narain**, 208 P.L.R. 1908

KINNINGTON, J

Reference. P.R. 9 of 1894, F.

(1-a) *Other remedies open to aggrieved party—High Court whether will interfere* See SPECIFIC RELIEF ACT, No 1, 5 A.L.J. 297.

(2) *Powers of—given to High Court by S. 25, Small Cause Courts Act, and S. 622, C.P.C., relation between* See ACT IX OF 1887 (SMALL CAUSE COURTS), No 1, 5 A.L.J. 295.

(3) *Conditions under which High Court can interfere in—with order of Court below Erroneous decision on question of law.* See CIV. PRO. CODE, No. 349, 3 M.L.T. 262

(4) —, power of High Court to interfere in, where decree holder's representatives are properly brought in See CIV. PRO. CODE, No 360, 3 M.L.T. 249

Revision—(Continued).

(5)—, power of High Court to interfere in, in proceedings, against pleader, commenced, but not heard and decided by District Judge. See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), No. 4, 12 C.W.N. 381.

(6) Acquiescence, question of, whether good ground for revision. See ACT XVIII OF 1881 (PUNJAB COURTS), AS AMENDED BY ACT XXV OF 1899, No. 9, 31 P.W.R. 1908

(7) High Court's power of revision where aggrieved party has other remedy available, (e.g.) by regular suit. See ACT VII OF 1876 (LAND REGISTRATION), No. 3, 12 C.W.N. 16—35 C. 120.

(8) Order under S. 312, C.P.C. -- Revision petition to High Court, whether lies—Appeal. See CIV. PRO. CODE, No. 208, 4 M.L.T. 96

(9)—, when allowed— Civil Procedure Code, S. 622. See CIV. PRO. CODE, No. 352, 11 O.C. 238.

(10) Compensation money paid to Hindu widow—Reversioner's application for reference to Civil Court—Order by Judge on reference directing refund of money already paid by Collector—Order not one under S. 32, Land Acquisition Act—Incompetency of Judge to proceed under S. 32—No appeal from order under S. 32—Power of High Court to interfere in revision. See ACT I OF 1891 (LAND ACQUISITION), No. 19, 12 C.W.N. 1039

(11) Dismissal of first application for maintenance—Whether it is a bar to second application on same facts—Where substantial justice has been done by the lower Court, whether High Court will interfere in revision. See RES JUDICATA, No. 9, 14 BUR. L.R. 259

(12) Nature of High Court's revisional jurisdiction—Initiation of criminal proceedings, under S. 476, Crim. Pro. Code—Consideration for High Court in exercising powers of revision—Stay of criminal proceedings pending civil appeal to High Court, whether justifiable and when—Civ. Pro. Code, S. 622—Charter Act, S. 15. See CRIM. PRO. CODE, No. 7, 35 C. 900

(13) Wrong interpretation of documents, whether amounts to material irregularity—Lower Court completely ignoring terms of a document and placing upon it a perversely erroneous construction—Chief Court's power of revision. See ACT XVIII OF 1881 (PUNJAB COURTS), No. 10, 175 P.L.R. 1908.

(14) High Court's power of revision where aggrieved party has other remedy available. See CIV. PRO. CODE, No. 354, 4 M.L.T. 325.

Revision—(Concluded).

(15) Sale of joint immoveable property in foreign territory by order of British Insolvency Court—Suit for refund of portion of sale-proceeds by co-owners, a suit for an interest in immoveable property, not cognisable by British Courts—Proper remedy was by suit in Court having jurisdiction—Not a fit case for revisional interference. See CIV. PRO. CODE No. 37, 12 P.R. 1908.

(16) Judge declaring certain persons to be touts—Application to Division Bench of High Court under S. 15, 24 and 25 Vic. Cap. civ—Power of Bench to revise such order. See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), No. 8, A.W.N. (1908), 279.

(17) Powers of Chief Court, for revision under S. 70 (1) (b), Punjab Courts Act, 1884 of order under S. 19, Act IX of 1899. See ACT IX OF 1889 (ARBITRATION), No. 1-a, 144 P.R. 1908.

Reza Mulkat

(1) *Reza mulkiat*, meaning of—Grove-holder—Settlement decree—*Wajub-ul-arz*.

Held, that the term "Reza mulkiat" means a proprietary or under-proprietary title in a small plot of land. **Sheo Dayal Singh v. Suraj Kumar**, 11 O.C. 164.

EVANS, JC

Right of suit

(1) Mahomedan mosque founded by various classes of Mahomedans—Charter of incorporation obtained by a portion of the congregation disregarding the right of the rest—Remedy of the latter—Court will grant relief to aggrieved members of unauthorised religious communities. See MAHOMEDAN LAW (WAKF), No. 4, 13 C.W.N. 26 (P.C.)

(2) Co-owner of estate suing other co-owner for partition of chowkidari chakran lands of portion of estate—Maintainability of suit. See PARTITION, No. 1, 12 C.W.N. 640

(3) Demarcation of village boundaries accepted by Settlement authorities and agreed to by defendants—Conduct of parties with reference to and long possession of such land—Suit by Government to impugn correctness of demarcation proceedings, maintainability of. See DEMARCATION, No. 1, 11 O.C. 30

(4) Duty and penalty of insufficiently stamped documents recovered from person filing document by Collector—Proper authority to review Collector's order—Suit by such person against Secretary of State for collecting duty

Right of suit—(Continued).

due from third person, maintainability of. See STAMP ACT (II OF 1889), No. 7, 5 A.L.J. 262.

(5) Rectification of sale-deed upon which plaintiff's title rested not made as required by S. 31, Specific Relief Act—Maintainability of plaintiff's suit. See SPECIFIC RELIEF ACT (I OF 1877), No. 4, 11 O.C. 93.

(6) Right of person, holding permanent interest of inferior grade, to sue for partition persons holding interest of superior grade. See PARTITION, No. 3, 7 C.L.J. 449.

(7) Suit by co-sharer landlord—Co-sharers refusing to join as plaintiffs—Co-sharers consequently made defendants in suit—Whether co-sharer landlord entitled to maintain suit for entire rent. See LANDLORD AND TENANT, No. 13, 7 C.L.J. 425.

(8) Suit by wife for declaration that neither her husband nor another, to whom husband transferred her by deed of repudiation, have conjugal rights against her, maintainability of. See MAINTENANCE, No. 2, 31 P.R. 1908.

(9) —for damages—Defamation of class—Cause of action of individual. See LIBEL, No. 1, 12 C.W.N. 490.

(10) Bills of exchange endorsed over to a person—Indorsee can maintain suit, without disclosing principal, as holder in due course under S. 53 of the Negotiable Instruments Act. See ACT XXVI OF 1881 (NEGOTIABLE INSTRUMENTS), No. 1, 10 Bom. L.R. 268.

(11) Maintainability of suit, by *shebait*, of idol, for declaration that property sought to be sold in execution of personal decree against him is endowed property—. See CIV. PRO. CODE, No. 156, 12 C.W.N. 308.

(12) Estate belonging to living Hindu Debtor—Whether administration suit maintainable to administer such estate. See ADMINISTRATION SUIT, No. 1, 10 Bom. L.R. 519.

(13) Manager of joint Hindu family can represent it in suits brought on behalf of it—Coparcener can also represent if his action is consented to or ratified by him co-parceners—Conciliator's certificate obtained under S. 46 of Delhi and Agriculturists' Relief Act by one coparcener as manager or with consent of other members—Maintainability of suit by coparceners to which S. 47 of Act applies. See HINDU LAW (JOINT FAMILY), No. 9, 10 Bom. L.R. 505.

Right of suit—(Continued).

(14) Auction purchaser on obtaining delivery of possession under S. 318, C.P.C., dispossessing judgment-debtor's tenant—S. 319, C.P.C., not proceeded under—Dispossession of judgment-debtor's tenant not in due course of law—Suit by tenant of judgment-debtor against auction-purchaser, maintainability of. See SPECIFIC RELIEF ACT, No. 2, 12 C.W.N. 604.

(15) Brahmin of Gopalpur in the Amritsar District—Son's right to question the validity of alienation by father. See CUSTOMS (PUNJAB—ALIENATIONS), No. 2, 58 P.R. 1908.

(16) Male proprietor making a gift to his daughter with the consent of a childless son—Right of reversioners to contest the alienation. See CUSTOMS (PUNJAB—ALIENATIONS), No. 2, 58 P.R. 1908.

(17) Alienation by male proprietor—Next reversioner's right to sue for setting it aside in the presence of minor adopted son. See CIV. PRO. CODE, No. 311, 56 P.R. 1908.

(18) Right of sons born before the adoption of their father to contest alienation by father of his adoptive father's property. See CUSTOMS (PUNJAB—ALIENATIONS), No. 16, 66 P.R. 1908.

(19) Suit to correct or alter entries in record of rights, published under Ch. V, Bengal Tenancy Act, not maintainable—Recourse to be had to special remedy provided in chapter. See ACT VIII OF 1885 (BENGAL TENANCY), No. 21, 12 C.W.N. 1032.

(20) Assignee of purchaser of estate sold under Revenue Sale Law can sue to avoid encumbrances. See ACT XI OF 1879 (REVENUE SALE LAW), No. 5, 12 C.W.N. 1029.

(21) Claim for declaring that defendant was not pregnant at her husband's death—Declaratory suit—Not maintainable. See DECLARATORY SUIT, No. 1, 124 P.W.R. 1908.

(22) Co-occupant in Beral in survey number, whose interest is sold by auction to satisfy mortgage decree, not entitled to sue for redemption *re* shares so sold. See PRE-EMPTION, No. 29, 4 N.L.R. 138.

(23) Widow having fund from her husband's estate to maintain her for five years—Suit for arrears of maintenance premature. See HINDU LAW (WIDOW), No. 15, 10 Bom. L.R. 770.

(24) Landlord, suing in ejectment, not showing intention to avail himself of tenant's forfeiture and to determine the lease before

Right of suit—(Concluded).

bringing suit—Suit does not lie before such act showing intention is done. See LANDLORD AND TENANT, No. 26, 4 M L T. 221.

(25) Contract to transport Government salt—S. 87, Madras Salt Act—Suit to recover sums deducted under the terms of the contract—Maintainability. See ACT IV OF 1889 (SALT), No. 1, 4 M L T. 224.

(26) Right of manufacturer to sue for breach of trade mark, when different firm does the business. See TRADE MARK, No. 2, 13 C W N. 82

Riparian owner.

—claiming right to irrigate his lands from river must not interfere with lower riparian owner's rights. Upper riparian owner entitled to acquire easement to irrigate his land independently of S. 26 Limitation Act—Proof required from upper riparian owner relying on custom. See EASEMENTS, No. 5, 35 C. 851.

River.

(1) Public navigable river—Arm of the river being cut off from the main river, effect of, upon fishery right. See FISHERY, No. 2, 12 C. W. N. 559

(2) Difference between lands temporarily inundated and those becoming part of a river bed—Rights of owner. See LEASE, No. 2, 2 Sind L R. 1.

Riwaj-i-am.

Correctness of entry in *Riwaj-i-am* not supported by instances—Effect. See ACT II OF 1905 (PREFUNCTION), No. 3, 90 P R. 1908.

Roads

Necessary consequences and implications arising from the duty cast on Local Boards of maintaining roads. See ACT V OF 1884 (MADRAS LOCAL BOARDS), No. 1, 18 M L J. 91.

Royalty.

Suit for recovery of, on registered document—Art. 116 and not Art. 110 of Limitation Act governs suit. See TRANSFER OF PROPERTY ACT, No. 75, 12 C W N. 724

Sadr Courts

—, decisions of—Their binding character. See ACT XVII OF 1879 (BOMBAY), No. 3-a, 2 Sind L. R. 28.

Sale

(1) Vendor's lien for unpaid purchase-money—Sale deed containing full acknowledgment

Sale—(Continued).

of purchase money—Mortgagee taking the mortgage without notice of unpaid purchase money—Estoppel—Transfer of Property Act (IV of 1882), Ss. 3, 55 (1) (b), and 55 (6).

In a registered sale deed of a *chawl*, it was stated that the vendor had received consideration in full and there was also an acknowledgment of the vendor at the foot of the deed to the same effect. The vendor had also parted with all title deeds relating to the property. The vendor subsequently mortgaged the property to the plaintiff who had no knowledge that the full amount of the consideration money was not paid to the vendor though he knew that the vendor was in possession of some portion of the property.

Held, that the defendant was estopped from contending that she had a lien on the *chawl* for the unpaid balance of the purchase money by her declaration as to receipt of the whole purchase-money, and by her act of handing over the title-deeds.

Per BACHIOR, J.—A vendor of immovable property who endorses upon the sale deed a receipt for the purchase-money cannot set up a lien for unpaid purchase money as against a mortgagee for value without notice under the purchase. **Tchilram Girdharidas v Kashi-bai**, 10 Bom. L. R. 403

SIR LAWRENCE JENKINS, K. C. L. J., C. J. AND BACHIOR, J.

(2) Land sold by Government for arrears of revenue-holder of money decree against owner if such land bringing suit alleging that land bought by purchaser for and as trustee for the owner and praying that the land belonged not to the purchaser but to former owner—whether it is necessary first to set aside sale of land for arrears of revenue-plaint containing no allegation of attachment and objection, but allegation, thereby showing plaintiff's object was to vindicate the right to attach the property—whether an amendment of such plaint is allowable on second appeal—whether a person claiming to be the owner of attached property has a right of suit independent of S. 283 of the Civil Procedure Code (Act IV of 1852)

The first defendant's land was sold by Government for arrears of revenue and was bought by second defendant.

Sale—(Continued).

The plaintiffs who had obtained a money decree against the first defendant, brought this suit, alleging that the second defendant purchased the land on behalf of the first defendant, and in order to evade attachment of the same, and held the land as trustee for the first defendant. The plaintiffs prayed (*inter alia*) that, on payment of the arrears of revenue, the sale be set aside, and for a declaration, under Chap VI of the Specific Relief Act, that the land was the property of the first defendant and was held by the second defendant as trustee for the first defendant.

The District Court held the sale for arrears of revenue could not be set aside (which decision was admittedly correct), and without considering the other prayers in the plaint dismissed the suit.

Held, that, although the plaint was defective, as it contained no allegation of the attachment and the objection, *viz.*, as the allegations in the plaint (as set out above) showed clearly that the plaintiffs' object was to vindicate their right to attach the property, an amendment of the plaint should be allowed now, more especially, as the second defendant actually suggested the issue "does the second defendant hold the said lands in trust for the first defendant?"

It was admitted that Chap. VI of the Specific Relief Act does not apply to the case, but it was argued that, long before the suit was instituted, the plaintiffs attached the land in execution of their decree, and the second defendant applied for the removal of the attachment, but his application was adjourned pending the decision of the suit.

Held, that a person, who claims to be the owner of the attached property, has a right of suit quite independent of S. 283 of the Civ. Pro. Code (2). (a)

Held, also, that there is no reason why a decree-holder should not have a like right of suit, provided he has attached the property, and his right to attach it has been disputed.

Held, further that, as plaintiffs not only claimed reliefs to which they were not entitled, but also omitted to state all the material facts which would entitle them to any relief, no order for costs should be made. **The Societa Coloniale Italiana v. Maung Shwe Le**, 14 Bur. L.R. 135; 4 L.B.R. 252.

IRWIN, O.C.J. AND ORMOND, J.

Reference:—(a) 23 B. 266, *followed*.

Sale—(Continued).

(2a) *Contract for sale of house—Sale of encumbered property—Failure to clear encumbrance—Claim for rent—Refutation of purchase money—Transfer of Property Act—Applicability of principles of S. 55 (1) (a) and 5 (b).*

Plaintiff entered into a contract with defendant to sell his house to the latter, who was already in possession. The house was encumbered at the time of the contract. Plaintiff received a portion of the purchase money, agreed to clear the encumbrance himself within a certain time and execute a conveyance to the defendant on receipt of the balance at the time of the sale. Defendant continued in possession. Two years later, plaintiff, without clearing the encumbrance and executing the sale, sued defendant for rent of the house. There was no contract for payment of rent after the contract for sale. The defendant retained with himself the balance of the purchase money towards the payment of the encumbrance. *Held*, the plaintiff was not entitled to the rent. The defendant remained in possession as purchaser and owner, and all that remained for the plaintiff to do was to clear the encumbrance and execute the sale to the defendant. Plaintiff having failed to do this, the fault was his own and he could not hold the defendant liable to the rent or damages.

The principles of S. 55 of the Transfer of Property Act were applicable to the case, though the Act was not in force at the place where the contract was entered into. Plaintiff was bound to clear the encumbrance and the defendant was entitled to retain the purchase money. **H. McDonald v C. B. Wills**, 41 L.B.R. 224.

HARNOOLD, J.

(i) *Registered sale deed executed by Hindu widow to her nephew—Nephew pre-deceasing widow—Passing of title—Intention, when will affect the passing of title—Circumstances under which Court of equity will decline relief against a voluntary deed.*

If the parties intend that title should pass, the fact that no consideration was paid does not prevent title from passing (a)

Where the plaintiff intended that *some* title should pass, though not the title which the deed purported to convey, *held*, that the plaintiff could not plead the deed to be a mere sham and could not claim to be relieved as against its effect (b).

Sale—(Continued).

The circumstances in which a Court of equity will decline to give relief upon (that is, will decline to treat as operative) a voluntary deed alleged to have been executed for a special purpose, for which it was never required, summarized and explained (c). **Amirthathammal v Periasami Pillai**, 4 M.L.T. 279

ARNOLD WHITE, C. J., AND MILLER, J.

References—(a) 16 M.L.J. 147, F (b) 21 M 56, applied and 20 M 326 and 28 M 124, D. (c) 37 English Reports 744 (719) and 11 L.J. Ch. 49, R.

(3-a)—mortgage property cannot, under S. 99 of the Transfer of Property Act, be brought to, in execution of a simple money decree obtained by the mortgagee—but otherwise where it has been completed and confirmed. See TRANSFER OF PROPERTY ACT, No. 68, A.W.N. (1908), 19

(4)—of part of mortgaged property in execution of a decree for costs—subsequent suit for redemption will succeed only in respect of unsold portion of mortgaged property. See TRANSFER OF PROPERTY ACT, No. 69, A.W.N. (1909), 18.

(5) Non-payment of consideration—Sale never theless complete—Suit for possession—Maintainability. See TRANSFER OF PROPERTY ACT No. 18, A.W.N. (1908), 38.

(6) Mortgage with possession—Second mortgage under an unregistered deed—Delivery of property—Stipulation postponing redemption till payment of the additional advance, not binding on purchaser. See MORTGAGE (REDEMPTION), No. 17, 11 O.C. 248.

(7)—under Act XI of 1859—Suit by purchaser for recovery of possession or for assessment of rent and *mesne profits*—Reg. XIX of 1793. See GRANT, No. 1, 3 C 991

(8) Execution of money-decree—Property purchased subject to a mortgage—Estoppel—Right of purchaser. See DECREE, No. 6, 35 C 877.

(9) Breach of contract of—Specific damage proved to result from breach—Remedy of aggrieved party to sell refused goods, and then only sue for recovery of loss accruing on such sale, not at first to file suit for price of goods. See CONTRACT ACT, No. 28, 10 Bom. L.R. 1113.

(10) Vendors of property executing deed of indemnity for re-payment of purchase-money with interest and hypothecating certain property as security. Terms of indemnity held to amount to

Sale—(Concluded).

mortgage within S. 58, Transfer of Property Act. See TRANSFER OF PROPERTY ACT, No. 24, 5 A.L.J. 723.

(11) Auction sale in execution of a decree of immoveable property subject to a mortgage—Rights of mortgagee—Whether mortgagee can get the sale set aside. See MORTGAGE (GENERAL), No. 5, 7 P.W.R. 1908

(12) Execution sale—Ss. 274, 295, Civ. Pro. Code, 1882. See ATTACHMENT, No. 1, 91 P.R. 1908

--See also under VENDOR AND VENUE

Sale certificate.

(1)—if necessary to be filed in suit for establishment of title by auction-purchaser—Decree against landlord, if admissible in evidence against tenant

A purchaser of immoveable property at an execution-sale can establish his title by evidence independently of the sale-certificate, a sale-certificate is not the title, but merely the title-deed (a).

A decree obtained by a person claiming to have a proprietary right to certain lands, against other persons who set up similar proprietary right to the same lands, is admissible in evidence against the tenants of the latter, who were not parties to the suit in which that decree was obtained, and who do not claim independently of their landlords (b). **Tantardhari Singh v Sundar Lal Missir**, 7 C.L.J. 381

MOOKERJEE AND CASPERSEN JJ

References—(a) 27 B. 374 and 305; followed (b) 25 C 522, referred to.

(2)—does not create a title, but is merely evidence of title—Title of purchaser when becomes final. See ACT XI OF 1859 (REVENUE SALE, BENGAL), No. 4, 7 C.L.J. 387.

(3)—granted by Collector in accordance with the Rules issued by the Board of Revenue after sale of "B Glass" lands—Transfer of title—Registration. See REGISTRATION ACT, No. 7, 35 C. 614

Sale Proclamation

(1) Statement of value in should be approximately correct. See CIV. PRO. CODE, No. 197, 12 C.W.N. 512.

(2) Service of sale proclamation, if should be in every part of the property—Statement of value, if material. See CIV. PRO. CODE, No. 179, 12 C.W.N. 758.

Salt Act.

See ACT IV OF 1889 (MADRAS).

Sanad.

(1) *Construction of—Mokarari, grant of—Revision of rent, if in perpetuity—Set off—Res judicata—Civ. Pro. Code, S. 13—Non-realization of rent for many years, effect of—Landlord and tenant—Batta, agreement to pay, if and when legal*

On the construction of the *sanad*, which recited that, by a previous grant, Rs. 72 had been fixed as the annual horse expenses of the lessee to be paid out of *mokarari* rent of Rs. 250, and as the lessee had with the consent of the donor taken a transfer of the *mokarari* interest, the sum of Rs. 72 was to be annually set off against the *mokarari* rent, and the remainder Rs. 178 was remitted for the kitchen expenses of the lessee and for feeding the poor and occasional visitors and which concluded with the following statement, *viz.*, "This *sanad* is, therefore, granted to Shah Piri Mahomed Saheb, as regards the remission of Rs. 250, being the amount of *mokarari* rent of *mouzah* Kaler, and according to this *sanad*, the Shah Saheb as well as his heirs shall get acquittances year after year from my *cutchery*."

Held, that there was no maintenance grant in perpetuity to the lessee or donee and his descendants from generation to generation, nor was there even a maintenance grant to the donee and his heirs, but that there was a maintenance allowance granted to the donee and his heirs then living (a).

Per Stephen, J.—Where in a previous litigation the question was whether the heirs of the grantee were entitled to claim the remission of rent and the same question, that is, as to a permanent remission of rent, is raised in a subsequent litigation by the transferees from the representatives of the original grantee, the decision in the former litigation does not amount to *res judicata*.

A claim for *batta* being a claim in excess of rent is not enforceable at law.

Per Mookerjee, J.—The Revenue Courts are Courts of limited jurisdiction, and notwithstanding the decision of the Collectorate Court, a suit may be brought in the ordinary Civil Court to establish the character of the land in suit, that is whether it is rent-free or rent-paying, in other words, the Revenue Court and the Civil Court are not Courts of concurrent or equal jurisdiction for the purposes of a

Sanad—(Concluded).

suit to declare finally, whether the land is rent-free or liable to pay rent.

A decision of the Revenue Court may be evidence, but it is by no means conclusive upon the issue whether the land is rent-free, or rent-paying (b).

A maintenance grant is *prima facie* for the life of the grantee (c).

But the presumption may be rebutted, either by the express provisions of the grant, or where the terms of the original grant are unknown, by long course of conduct of the parties concerned (d).

When the relation of landlord and tenant exists between two persons in respect of any property, the mere non-payment of rent, though for many years, is not sufficient to show that the relationship of landlord and tenant has ceased (e).

Batta is not *abuab*, if it is merely an allowance for the exchange of *sacca* rupees into Company's rupees, the latter of which was introduced by Act XVII of 1835, and the former ceased to be a legal tender by Act XIII of 1836. If the rent claimed has been fixed before 1836, *Batta* is *prima facie* not an *abuab*, but if it has been fixed subsequently, it is *prima facie* an *abuab*. **Rameshar Koer alias Dolphin Saheba v Go bardhan Lal**, 7 C.L.J. 202

STEPHEN AND MOOKERJEE, JJ.

References (a) 9 I.A. 33—8 C. 664; 14 I.A. 7, 16—14 C. 296, 18 I.A. 22—15 B. 222, 28 I.A. 1, 23 A. 194, 28 I.A. 152—24 C. 720, D. (b) 15 B.L.R. 238—21 W.R. 154, 7 B.L.R. 673—15 W.R. (P.G.), 30, 11 B.L.R. 434—19 W.R. 322, 26 A. 468 and 25 W.R. 189, R. (c) 22 W.R. 225, 28 I.A. 1—23 A. 194, R. (d) 4 C.L.J. 399, R. (e) 7 W.R. 400, 24 W.R. 386, 1 C. 311, 7 B. 40, 6. C.L.J. 72, (1856) S. D. A. 617; (1865) B.L.R. (F.B.) 202 (21-322), L. (f) (1818) S.D.A. 680; 6 C.L.J. 637, 6 C.L.J. 667, —.

Sanction to prosecute.

(1) *Offence committed before one Munsiff—Prosecution ordered by another—Validity—Crim. Pro. Code, S. 476*

An affidavit which was sworn to by the petitioner was filed before an Additional Munsiff in a suit pending before him. That officer was transferred, and the suit was made over to the second Munsiff, but the miscellaneous proceeding, in which the matter contained in the affidavit

Sanction to prosecute—(Concluded)

was the subject of enquiry, was continued by the first Munsiff who ordered the petitioner to be prosecuted under S. 476, Cr. P. C.

Held, that such an order can only be passed by the officer before whom the affidavit was filed, and that, as the affidavit in this case was filed before the Additional Munsiff, the first Munsiff had no jurisdiction to make the order.

Kartik Ram Bhakat v Emperor, 35 C 114.

RAMPINI, AG. C. J. AND SHAKEUDDIN, J.

References —34 C 551=11 C.W.N. 569 P. 29 M. 331, *not F.*

(2) *Power of Court to order prosecution under S. 476, Crim. Pro. Code—Execution proceedings—Judicial proceedings.*

The powers conferred by S. 476, Crim. Pro. Code, can only be exercised if the offences, in respect of which a prosecution is ordered, have come to the cognizance of the Court in a judicial proceeding.

Execution proceedings subsequent to the trial of a suit are not judicial proceedings. **Kanto Ram Das v. Gobardhan Das**, 35 C 133.

RAMPINI, C. J. AND SHAKEUDDIN, J.

(3) *Crim. Pro. Code, S. 193—Sanction to prosecute—Appeal.*

Held that when sanction to prosecute has been granted by a Court under the provisions of section 193 of the Code of Criminal Procedure, only one appeal from such order will lie under that section. **Kanhai Lal v. Chhadammi Lal**, A.W.N. (1908), 290.

AIKMAN AND KARAMAT HUSAIN, JJ.

References —28 A. 554, A.W.N. (1908), 102 and 30 M. 382, *R.*

Santan

—, meaning of See CONSTITUTION (OF DEEDS), No. 1, 7 C.L.J. 241.

Secretary of State

Protection afforded to judicial officer acting in his official capacity—Extends to Secretary of State for India in Council. See ACT XVIII OF 1850 (PROTECTION OF JUDICIAL OFFICERS), No. 1, 59 P.W.R. 1908.

Security.

Application for setting aside *ex parte* decree—Where security is required on such application—Whether such security should not be excessive—Whether such security should not be in excess of the value of the mortgaged property in suit. See *EX PARTE DECREE*, No. 2, 14 Bur. L.R. 214.

Service.

(1)—of notice of appeal, whether sufficient without declaration required by S. 82, Civ. Pro. Code. See LIMITATION ACT, No. 116, 18 M.L.J. 96.

(2) Suit for dissolution of marriage—Plaintiff's petition should be personally served, under S. 50, Indian Divorce Act, on respondent or sufficient notice of its contents should be given him. See ACT IV OF 1869 (INDIAN DIVORCE), No. 3, 12 C.W.N. 1009.

(3) Respondent leaving for England—Service of notice of appeal on him—Practice. See *FRANCO*, No. 2, 13 C.W.N. 18.

Set off.

(1) Execution-sale—Decree-holder bidding for property with the permission of the Court—Decree-holder's right to set off. See *CIV. PRO. CODE*, No. 199, 10 Bom. L.R. 296.

(2) Written statement of defendant claiming set-off—Whether requires *ad valorem* Court fee. See *COURT-FEE*, No. 1, 80 P.W.R. 1908.

Settlement Record.

Entry in, evidentiary value of. See JURISDICTION (GENERAL), No. 5, 8 C.L.J. 116.

Shamilat land.

(1) *Portion only of such land purchased from co-sharer—Right of purchaser to claim partial partition of such land.*

A purchaser, from a co-sharer in the village of a portion only of the common *shamilat* land is not entitled to claim partial partition and could not have that plot alone partitioned (a). **Sheo Nath v. Prama Nand**, 32 P.R. 1908=75 P.W.R. 1908=151 P.L.R. 1908.

CLARK, C.J., AND REID, J.

References (a) 19 M. 267; 23 B. 184, *Expl.* 77 P.R. 1887, 12 C. 566, 13 M. 275, 20 M. 243, 24 P. 128, *R.*

(2) Denial of right to share—in a Revenue partition proceeding—Revenue officer's order to establish the right by a civil suit—Cause of action in such a case, when arises. See LIMITATION ACT, No. 87, 11 P.W.R. 1908.

Sharak Shikmi.

• Whether jointness of holding essential, to the status of—Application of the term. See CUSTOMS (PUNJAB), PRE-EMPTION, No. 7, 12 P.R. 1908.

Shareholder.

—of company, right of, to inspect books and, take extracts—Special interest and definite object, necessary—See CORPORATION, No. 1, 12 C.W.N. 825 (P.C.).

Shobait.

(1) Trespass by—Liability of idol for mesne profits. See RELIGIOUS ENDOWMENTS, No. 1, 12 C.W.N. 550.

(2) Hereditary shobaitship, whether can be validly disposed of by will—Usage—Family custom. See RELIGIOUS ENDOWMENTS, No. 2, 12 C.W.N. 923.

(3) Decision against person not shobait, when binds *Thakur*. See DEBUTTER ESTATE No. 1, 12 C.W.N. 739.

(4) Right of inheritance to, same as that to immovable property, in the absence of directions in will. See HINDU LAW (INHERITANCE), No. 5, 8 C.L.J. 369.

Shiahs.

—, power of devise amongst,—Will. See MAHOMEDAN LAW (WILL), No 1, A.W.N. (1908), 55.

Shurkayan-i-Shikmi.

—meaning of—Wajib-ul-arz—Construction. See PRE-EMPTION, No. 4, 5 A.L.J. 52.

Small Cause Court.

(1) Jurisdiction of, to award compensation for erroneous attachment before judgment—S. 491, C.P.C.

By Sch II of the C.P. Code, Ch XXIV of the Code, relating to arrest and attachment before judgment, is extended to the provincial Courts of Small Causes, except as regards immovable property. This exception prohibits the Small Cause Court not only from ordering attachment of immovable property, but also from determining the question of compensation, in case an attachment is ordered by mistake. That Court has, therefore, no power to allow compensation under S. 491 of the Code, and its order so far is *ultra vires*. Such a case is not one of compensation for improper attachment provided for by S. 491, but one for an attachment, which the Court had no power to order. **Baru Mal v. Munir Khan**, 77 P.R. 1907=50, P.W.R. 1907=30 P.L.R. 1908.

LAL CHAND, J.

(2) See JURISDICTION (OF SMALL CAUSE COURTS).

Solicitor.

(1) Recovery of costs due to—Summons. See LIMITATION ACT, No. 118, 9 Bom L.R. 508=32 B 1.

Specific Performance.

(1) Contract to sell—Subsequent sale to another with notice of previous contract—Suit for possession—Stipulation of penalty for non-performance of contract—S. 18, Act, S. 18,

A person who has entered into a contract for the purchase of a certain property can sue for possession of the property and specific performance of the contract, although it is subsequently sold to another who has had notice of the previous contract.

The stipulation of a penalty for the non-performance of the contract to sell, *per se*, does not avoid a suit for specific performance under S. 18 of the Specific Relief Act. **Hukan Chand v. Nikka Singh**, 15 P.R. 1908=27 P.W.R. 1908=97 P.L.R. 1908

REID, J

References —10 C. 710, 2 C. 468, 6 C 534; 31 P.R. 1897; 2 P.R. 1885, R.

(2) Suit for recovery of money agreed to be paid on a mortgage-debt—Specific performance of contract to lend money—Specific Relief Act (I of 1877), S. 21, cl. (a).

The plaintiff mortgaged certain property to the defendants for Rs 12,000. He received Rs. 4,000 in cash Rs 7,000 were left with the defendants to pay off a prior mortgage and the balance, Rs. 1,000, was to be paid to the plaintiff after a month and half. This was a suit to recover this sum of Rs 1,000. The defence was that the defendants had to pay Rs. 8,400 to the prior mortgagee so that instead of there being a sum of Rs 1,000 due to the plaintiff he owed them Rs 400.

Held that, it being a contract to lend money, a suit for specific performance of such a contract was not maintainable.

Held, further, that such a contract does not create a debt (a). **Mehdi Abbas v. Muhammad Fakhr-ud-din**, 11 O.C. 217.

CHAMBER, J.C.

References —(a) 8 O.C. 5 and A.W.N. (1908), 105, R.

(3) Suit for—, whether necessary for recovery of Chakran land on its resumption and transfer to Zemindar. See CHAKRAN LAND, No. 1, 12 C.W.N. 459.

Specific Performance—(Concluded).

(4) Benami transfer of property for illegal purpose^a not carried into execution—Contract to sell by transferee. Suit for specific performance of contract—Right of transferor to resist suit. See **Benami Transactions**, No. 1, 3 M.L.T. 244.

Specific Relief Act.

(1) *S. 9—Suit for possession—Criminal proceedings—Effect of Revision—Other remedy open—Not entertainable.*

Criminal proceedings, if any, taken under S. 145 of the Crim. Pro. Code in no way interfere with the plaintiff's right under S. 9 of the Specific Relief Act, which accrued so soon as his possession was interfered with by the defendant.

The High Court will not interfere in revision where other remedies are open to the aggrieved party (a) **Jwala v. Ganga Prasad**, 5 A.L.J. 297 - A.W.N. (1908), 142 = 30 A. 331

STANLEY, C.J. AND KARANAT HUSAIN, J.

Reference —(a) 10 A. 119, referred to

(2) *S. 9—Dispossession in due course of law—Suit by tenant of judgment-debtor against auction-purchaser—Delivery of possession—Civ. Pro. Code (Act XIV of 1882), Ss. 318 and 319.*

When, on obtaining delivery of possession of immovable property under S. 318 of the Code of Civil Procedure the auction-purchaser dispossessed a tenant of the judgment-debtor, held, that the auction-purchaser, not having proceeded under S. 319 of the Code, the dispossession was not in due course of law and a suit under S. 9, Specific Relief Act, was maintainable. **Muluk Patooni v. Bharat Chandra Das**, 12 C.W.N. 634

STEPHEN AND HOLMGOOD JJ.

(3) *S. 18—Contract to sell—Subsequent sale by other with notice of previous contract—Suit for possession—Stipulation of penalty for non-performance of contract—Effect. See SPECIFIC PERFORMANCE, No. 1, 15 P.R. 1908.*

(4) *S. 31—Objections by respondent against a party not appellant in the appeal and having distinct interest—Rectification of sale-deed upon which plaintiff's title rests.*

A respondent has no right to file objections against a party who is not an appellant in the case and whose interest is entirely distinct from those of the appellant.

Specific Relief Act.—(Continued).

In a suit for possession, the plaintiff's title to the plots in suit rested upon a sale-deed. Those plots did not appear in the deed, but it was said that, by mistake, other numbers were inserted. Another sale-deed was subsequently executed by the defendant in favour of the plaintiff with the object of rectifying the mistake in the first deed, but the numbers in suit did not appear in the second deed.

Held, that the deed, upon which the plaintiff's claim rested, not having been rectified in accordance with the provisions of S. 31 of the Specific Relief Act, the plaintiff's suit was not maintainable (a). **Sajjad Husain v. Bakar Ali**, 11 O.C. 93.

GRIFFIN, A.J.C.

References —(a) 23 A. 93, 30 C. 655, F.

(5) *Ss. 38, 41—Contract by lunatic—Treachery not known to other contracting party—Equitable relief—Power of Court to grant relief. See LUNACY, No. 1, 10 Bom. L.R. 1004.*

(5-a) *S. 41—See No. 5, supra.*

(6) *S. 42—Declaratory suit—Plaintiff's chance of succession to the property in suit very remote—Dismissal of suit.*

Where the plaintiff, whose claim of succession to the property in the suit was a very remote one, sued to set aside a mortgage of the property, and the suit was dismissed, the Chief Court declined to make an order of remand for further enquiry in the case **Tara Singh v. Mussammat Chandi**, 51 P.L.R. 1908

ROBERTSON AND SHAH DIN, JJ.

(7) *S. 42—Possession—Suit for declaration of title—Application for partition in Revenue Court—Objection—Land Revenue Act (Act III of 1901), sections 111, 233 (k).*

The plaintiffs, who were lambardars, objected, under section 111 of the Land Revenue Act, to an application for partition made by the defendant, alleging that the latter had no share in the Zemindari, and they were required to institute a suit in the Civil Court. Accordingly the present suit for declaration was brought.

Held, that the plaintiffs, being admittedly in possession as lambardars, all that was needed was a declaration to the effect that the defendant had no title, and such a declaration having been made by the Civil Court, it would not be necessary for the plaintiffs to seek any further relief. The suit, therefore, was not barred under the provisions of section 42, Specific Relief Act.

Held also, that section 233 (k), Land Revenue Act, did not apply to the case, as it was provided

Specific Relief Act—(Continued).

for by section 111 of that Act, and the decision of the Civil Court referred to in the latter section meant the "final decision" of that Court. **Ram Charan v. Ram Partab**, 5 A.L.J. 614 = A.W.N. (1908), 249:

STANLEY, C.J., AND BANERJI, J.

- (8) *S. 42, proviso—One plaintiff out of possession—Other plaintiff in possession in defendant's right—Declaratory suit—Second suit for possession.*

Where, out of two plaintiffs to a suit for declaration of title, it appeared that one was not in possession of the property claimed, and the other was in possession but in the right of the defendant who had previously been in possession, held, that the suit was barred by the express provisions of section 42, Specific Relief Act, and ought to be dismissed. But the dismissal of this suit would not affect the right of these plaintiffs, if they were entitled to possession, from substituting and maintaining a suit for possession. **Akbar Khan v. Turaban**, 5 A.L.J. 640

STANLEY, C.J., AND BANERJI, J.

- (9) *S. 42—Declaration, suit for, that a decree was fraudulent—Further relief—Court-fee how to be assessed—Plaint originally correctly framed—Subsequent amendment, defective—Restoration by appellate Court*

It is necessary for the plaintiff to ask not only for a declaration that a decree obtained against him was fraudulent, but also for a consequential relief, viz., either to have the fraudulent decree set aside or to have a perpetual injunction granted to restrain the decree-holder from executing it (a)

A suit for a declaration that a decree obtained against the plaintiff was fraudulent, with a consequential relief, should ordinarily be valued at the amount for which the decree sought to be set aside was obtained (b)

Where the plaint was originally correctly framed, but by reason of an unfounded objection as to deficiency of Court-fees taken by the defendant, the plaintiff withdrew his prayer for consequential relief, which resulted in the dismissal of the suit on the ground of its not being maintainable, the High Court in second appeal allowed the plaint to be amended and restored, to its original form. **Thakur Prosad v. Puhkal Singh**, 8 C.L.J. 485.

MOOKERJI AND CASPERSZ, JJ.

Refs. —(a) 25 G. 49, F (b) 11 C.W.N. 705, F.

Specific Relief Act—(Continued).

- (10) *S. 42 Proviso—Civ. Pro. Code, S. 278—Suit for declaration of title to attached property—No application for removal of attachment under S. 278, C. P. C.—Suit not barred.*

The object of the proviso to S. 42 of the Act is to prevent a plaintiff from getting a declaration in one suit, and consequential relief afterwards in another.

In a suit which was merely for a declaration that certain land attached and sold in execution of a decree at the instance of the defendant was the property of the plaintiff and not liable to attachment, it was found that no application for removal of attachment had been made under S. 278, C. P. C.

Held, the proviso to S. 42 of the Act did not apply to the suit. **P. L. A. N. Allagappa Chetty v. Nazamat Ali Chowdhry**, 4 L.B.R. 263

IRWIN, O.C.J.

References —1 L.B.R. 1, 4 L.B.R. 88, 4 L.B.R. 75, R

- (10-a) *S. 42—Monastery a monastery land Poggahla gift of property to ponggy—Whether such gift gives donee any right to property—Where donee's right is disputed—Whether donee in such case has a cause of action—Whether suit lies to protect the rights of ponggy—Where such gift was made before 1876—Whether jurisdiction of Civil Courts is barred—Lower Burma Land and Revenue Act (No. II of 1876), Ss 4 (b) and 56.*

C sued A for a declaratory decree, under S. 42 of the Specific Relief Act, to declare his right with respect to certain land alleging that, in the year 1236 B.E., a monastery was built on it, and that it and the land around it was given him as a *poggahla* gift, that, in the year 1261 B.E., the monastery fell into disrepair, and he tried to pull it down and build a new one on the site and that the defendants tried to prevent him from so doing. The defence was that the monastery was given as a *poggahla* gift but not the monastery land.

Held that, as the gift appeared to have been made in 1226 B.E., or before that date and long before the Lower Burma Land and Revenue Act came into force, by S. 4 (b) of the Act, nothing in Part II of the Act applied to the

Specific Relief Act—(Continued).

land and that the land did not come within the provisions of S. 56 of the Act; and that, therefore, the jurisdiction of the Civil Court was not barred with respect to it.

Held also that, as the plaintiff alleged that he was forcibly prevented from building a fresh monastery by certain persons, whom or whose representatives he sued and that, as the defence did not allege that he was not forcibly prevented, but that the land did not belong to him, in other words, that his claim to the land was contested, there was a cause of action, which was peaceful possession for the future.

It was also urged that the second Court was wrong in holding that, when the gift of the monastery was made, the land was included in the gift.

Held that the second Court agreed with the first Court in its view of the evidence, and that, as there was a concurrent finding of fact, that finding could not be questioned on second appeal.

It was further urged that the plaintiff could not sue in his personal capacity.

Held that, as in *poggalika* gifts the person to whom the offering is made has a right to keep it, a priest, who has received a *poggalika* gift, has a right to sue to protect his rights in it. *Mra Paw v. U Pyin Nya*. 14 Bur. L. R. 277.

HARTNOLL, J.

(11) S. 42—Suit for specific performance of contract of sale, based upon award of arbitrators.—Subsequent suit for possession, maintainability of. See CIV. PRO. CODE, No. 66, 4 N.L.R. 14.

(12) S. 42—Suit for declaration of title.—Property in possession of tenants—Receipt of rent not proved—Maintainability of suit. See CUSTOMS (PUNJAB), INHERITANCE AND SUCCESSION, No. 16, 5 P.R. 1908

(13) S. 42—Declaratory decree—Negative declaration—Declaration of contingent right. See JURISDICTION (GENERAL), No. 4, 12 C.W.N. 777.

(13-a) S. 45—Calcutta Municipal Act (III of 1899, B.C.), Ss. 88, 556—Agreement for lease—Contract—Calling of tenders, when obligatory—Covenant in a lease relating to the tenement—Mandamus—Matters of discretion.

Specific Relief Act—(Concluded).

Under S. 556 of the Calcutta Municipal Act, 1899, the Corporation of Calcutta has the power to lease any property vested in them on any terms they think fit, without calling for any tenders in that behalf.

Although a covenant in or in respect of a lease is a contract, yet, if the same relate to the demised premises and be not independent of them, then, in that case, the contract in the covenant does not come within the meaning of S. 88 of the Calcutta Municipal Act so as to make it obligatory upon the Corporation to call for tenders. *In the matter of Jogendra Nath Mukhuti*, 13 C.W.N. 129.

WOODROFFE, J.

(14) S. 45—Power of High Court to compel Board of Examiners to examine properly. See ATTORNEYSHIP EXAMINATION, No. 1, 12 C.W.N. 873.

Spiritual benefit

—whether the only principle of inheritance under the Dayabhaga School. See HINDU LAW (INHERITANCE), No. 4, 12 C.W.N. 511.

Stamp.

Memorandum of objection insufficiently stamped—Defect not made good—Dismissal for default—Appeal memo also insufficiently stamped—Appeal. See CIV. PRO. CODE, No. 309, 4 N.L.R. 168.

Stamp Act (I of 1879).

(1) *Signing, whether necessary for execution*—Unstamped document alleged to be in the possession of defendant—Admissibility of secondary evidence.

There is nothing to show that, in the Stamp Act of 1879, it was intended to exempt from stamp duty instruments executed otherwise than by signing.

The plaintiff sued for redemption of a mortgage, alleging that the mortgage was recorded on a *parabai* in the possession of the defendant. The defendant denied having any such document.

Held (1) that the *parabai* document, though not signed, was executed within the meaning of the Stamp Act (I of 1879), then in force, and therefore was not exempt from stamp duty; (2) and that secondary evidence of the contents of the unstamped document was not admissible, though the defendant was alleged to be with-

Stamp Act (II of 1899)—(Continued).

holding it. **Mi Ta v. Nga Sein**, U.B.R. (1907), 4th Quarter, Executiva—Signing, 5.

SHAW, J.C.

References:—U.B.R. (1892—96), I. 303, U. B.R. (1897—01), II. 365, 421; U.B.R. (1907), Ex. Signing, p. 1, 26 I.A. 262; 19 B. 535, R.

- (2) *Ss. 2 (2) and (3), 67, Sch. I, Art. 13—Bill of exchange—First of exchange stamped with one anna—Whether stamp duty necessary on second of exchange.*

A second of exchange, payable on demand, does not require to be stamped with a stamp of one anna, when the first of exchange has been stamped with a stamp of one anna. *In re The Netherlands Trading Society*, 4 L.B.R. 320 (F.B.).

IRWIN, C.J., HARTNOLL AND ORMOND, JJ.

- (3) *Ss. 2 (14) and Sch. I, Art. 5 (b)—Letter containing statement of a credit entry in writer's accounts, with rate of interest, and a promise to repay same with interest—Memorandum of agreement—Instrument—Liability to pay duty.*

Held (Ormond, J., *dissenting*) that a letter, acknowledging the receipt of a certain sum of money, as having been borrowed, two months before, for a particular period and at a particular rate of interest, and stating that the loan had been duly entered in the writer's books and that it will be repaid with interest on the due date, was an "instrument," as defined in S. 2 (14) of the Stamp Act, 1899, and was chargeable as a memorandum of agreement, under Art. 5 (b) of the first schedule to the Act, with a duty of 8 annas. *In re Y. R. S. A. R. Raman Chetty*, 4 L.B.R. 321=14 Bur. L.R. 292.

IRWIN, C.J., HARTNOLL AND ORMOND, JJ.

References.—21 Q.B.D. 352, 2 Q.B.D. 484 and 13 M. 255, R.

- (4) *S. 2, cl. 15—Instrument of partition—Stamp*

Lists of money bonds and lands prepared by members of a joint Hindu family indicating what portions have gone to the share of each at a private partition whereafter they begin to live separately, are to be deemed instruments of partition within the meaning of S. 2 (15) of the Indian Stamp Act, 1899. **Ganpat Kriparam v. Supdu Kriparam**, 10 Bom. L.R. 738=4 M.L.T. 144=32 B. 509.

SCOTT, C.J., BATCHELOR AND CHAUBAL, JJ.

Stamp Act (II of 1899)—(Continued):

- (4-a) S. 5—See No. 10, *infra*.

- (4-b) S. 6—See No. 10, *infra*.

- (5) *Ss. 12 (3), 36, 61—Drawing two lines across the face of an adhesive stamp—Effect—Appellate Court's power to question admissibility of document admitted by Court of first instance.*

It seems that the drawing of two lines across the face of an adhesive stamp on a document amounts to such cancellation as is required by S. 12 (3) of the Indian Stamp Act (a).

Where a document, on which a suit is brought, is filed with the plaint, and is admitted in evidence in the First Court without demur or objection, *held*, that objection to its inadmissibility cannot, under the circumstances of the case, be raised in the appellate Court (b).

No order with regard to the stamp having been made in this case by the Court of first instance, S. 61 of the Act is inapplicable. **Piran Ditta v. Mangal Singh**, 108 P.R. 1908.

RATTIGAN, J.

References.—(a) 28 B. 432, 6 Bom. L.R. 436, *doubted*. (b) 139 P.R. 1890, 2 P.R. 1891, 24 B. 360, R.

- (5-a) S. 23—See No. 9, *infra*.

- (5-b) S. 35—See No. 10, *infra*.

- (6) *S. 36—Instrument, insufficiently stamped—Admissibility of instrument when not to be questioned—Acknowledgment evidencing a fresh contract—*

Held, that an instrument once accepted, rightly or wrongly, in evidence cannot, by reason of the special provisions of S. 36 of the Stamp Act, be challenged on account of deficiency of stamp duty.

Where an acknowledgment contained the words "and shall be paid," *held*, that these words evidence a fresh contract furnishing an independent cause of action (a). **Humayun v. Wajid Ali**, 11 O.C. 152.

GREEVEN, J.C.

Reference.—(a) 3 O.C. 195, D.

- (6-a) S. 36—See No. 5, *supra*.

- (7) *Ss. 40 and 44—Duty and penalty recovered from person filing documents—Suit against Secretary of State, maintainability of.*

Certain documents insufficiently stamped were put in evidence by the representatives in interest of the executants. The Collector recovered

Stamp Act (II of 1899) - (Continued).

from the persons filing them, the duty and penalty by sale of their property. *Held*, that the Collector's order was open to review by Revenue authorities, and no suit lay against the Secretary of State for refund of penalty, realised. *Held* further, that the persons, who wish a document to be admitted in evidence, are the persons from whom a Collector can realise the duty and penalty, and if it is due from a third person, they can bring a suit and recover it from him. **The Secretary of State for India in Council v. Basharat Ullah**, 5 A.L.J. 202—A.W.N. (1908), 130—30 A 271.

Knox, J.

(7-a) S. 44—See No. 7, *supra*.

(7-b) S. 61—See No. 5, *supra*

S. 67—See No. 2, *supra*

(8) Sch. I, Arts. 1 and 5 (b)—Entry in creditor's account book acknowledging debt and stipulating to pay interest—Memorandum of agreement chargeable with duty of 8 annas.

Held, (Ormond, J., dissenting) that an entry in a creditor's account book, signed by the debtor and containing an acknowledgment of a debt, with the words "at a premium of one anna and six pies above the two months *tavana* interest" was more than a mere acknowledgment of a debt, as the particular words constituted a "stipulation to pay interest," and that the document was a "memorandum of an agreement," chargeable with a duty of 8 annas, under Art. 5 (b), Sch. I of the Act. *In re K. M. K. R. Kumarappa Chetty*, 4 L.B.R. 330 (F.B.)=14 Bur. L.R. 287.

IRWIN, C. J., HARTNOLL AND ORMOND, JJ

References.—35 C. 111, and 25 B. 373, F., 27 A. 284, Diss. and 22 C 757, R.

(9) Sch. I, Art. 5, cl. (b), Art. 1 and S. 23—Hatchitta, containing stipulation to pay interest—Acknowledgment or agreement—Stamp-duty.

Held that the document sued upon was not a mere acknowledgment of a debt, inasmuch as it contained a stipulation that the amount should bear interest at a certain rate, and should therefore have been stamped as an agreement or memorandum of agreement with a stamp of As 8 under cl. (b) of Art. 5 of Sch. I of the Stamp Act. **Mulchand Lala v. Kashibulal Biswas**, 11 C.W.N. 1120=35 C. 111.

RAMPINI, C.J., CASPI, SZ AND SHARFUDDIN, JJ.

Reference:—25 B. 373, *relied on*.

Stamp Act (II of 1899) - (Concluded).

(10) Sch. I, arts. 5 and 43 and Ss. 5, 6 and 35—Contract notes, containing provision for submission of disputes to arbitration, to be proved and stamped with duty of 8 annas See ARBITRATION, No. 4, 13 C.W.N. 63.

(11) Sch. I, art. 53 (c)—Stamp—Receipt for rent—Receipt for money paid out of Court in satisfaction of a decree for rent.

Although a receipt for rent of an agricultural holding is exempt from payment of stamp under art. 53 (c) of the Act, a receipt for payment out of Court of money due under a decree for such rent is not so exempt. **Emperor v. Dungar**, A.W.N. (1908), 272—5 A.L.J. 747

RICHARDS AND KARANAT HUSAIN, JJ.

(12) Sch. I, Arts. 55 and 23—Conveyance—Release.

A document which is styled as a release, under Art. 55, Schedule I of the Stamp Act, under which the executant not only relinquishes his rights over a certain portion of his property, but receives a specific sum of money for the bargain, is a conveyance and is chargeable as such under Art. 23 of the Act. *In re Hiralal Nawalram*, 10 Bom. L.R. 730=4 M.L.T. 146 = 32 B 505

SCOTT, C.J., BATCHELOR AND CHALBAI, JJ

St. 11 and 12 Vic., ch. 21 and 40.

See INSOLVENCY ACT

St. 28 and 29, Vict., ch. 15.

S. 3, interpretation of, by reference to repealed St. 21 and 25 Vict., ch. 105, S. 18—See JURISDICTION (OF HIGH COURT), No. 1, 12 C.W.N. 657.

St. 41 and 42 Vic., ch. 42.

See INSOLVENCY ACT (St. 41 and 42 Vic., ch. 42).

Statutory charge.

Suit by vendor for the enforcement of payment of purchase-money by sale of purchased property is a suit to enforce—differing from the lien which an unpaid vendor in equity possesses for recovery of balance of purchase-money. See LIMITATION ACT, No. 75, A.W.N. (1908), 71.

Step in aid of execution.

(1) Payment of process fees, unaccompanied by any application asking Court to take some specific action, whether. See LIMITATION ACT, No. 131, A.W.N. (1908), 74.

Step in aid of execution—(Concluded).

(2) Application by decree-holder praying for leave to bid at sale and that amount bid by him may be set off against decretal amount, whether a—See LIMITATION ACT, No. 127, 12 C.W.N. 621.

Sub-Mortgage.

—See MORTGAGE (SUB-MORTGAGE).

Succession.

- (1) *Non-talukdar property, rule of succession applicable to—Talukdar, acquisition by—Succession*

Certain properties were granted to G by a *sanad* which provided that it should descend to male heirs only under the rule of primogeniture. G and his successors acquired other property.

Held that the devolution of the acquired property was not governed by the *sanad*.

Held further, that a zemindar cannot make his property descendible in a manner not recognised by the ordinary law to which he is subject (a) **Rajendra Bahadur Singh v. Rani Raghubans Kunwar**, 11 O.C. 256.

CHAMBER, J

References —(a) L.R. 17 I A 173 and L.R. 28 I A. 100, R

(2) Succession to foreign state—Jurisdiction of Court in British India to decide the question as to who is entitled to succeed See JURISDICTION (GENERAL), No. 4, 12 C.W.N. 777

Succession Act

See ACT X OF 1865

Succession Certificate Act.

See ACT VII OF 1889.

Suits Valuation Act.

See ACT VII OF 1887.

Sunday.

—proceedings of Munsiff taken on, whether vitiated—Applicability of Lord's Day Act to India. See PRACTICE, No. 3, 5 A.L.J. 106.

Surety.

- (1) *Suit to recover debt from surety—Admission by principal no evidence of amount of debt as against the surety.*

Held, that, in a suit by a creditor to recover the amount of his debt from a person who had become surety for the debtor, an admission of the principal debtor as to the amount of the

Surety—(Concluded).

debt is not evidence as against the surety. **Ram Bhajan Lal v. Sheo Prasad**, A.W.N. (1907), 293=3 M.L.T. 62=5 A.L.J. 142.

AIKMAN, J.

Reference —17 Ch. 1, 668, 2.

(2)—of guardian—Liability, whether extends to guardian's dealings with properties other than those specified in the petition for appointment of guardian. See GUARDIAN AND MINOR, No. 3, 12 C.W.N. 481

(3) Effect of guarantee contingent upon an event which does not happen. See TRANSFER OF PROPERTY ACT, No. 36, 14 Bur. L.R. 159.

(4)—Whether liable for acts and defaults of administrator, who obtained letters of administration by fraud—Surety not party to fraud or cognisant of it. See LETTERS OF ADMINISTRATION, No. 2, 12 C.W.N. 802 (P.C.)

(5) Obligation of Mitakshara son to discharge debt of father incurred as— See HINDU LAW (DEBTS) No. 7, 13 C.W.N. 9.

(6)—for performance of decree after it had been passed, liability in execution of—Security. See CIV. PROC. CODE, No. 165, 11 O.C. 342.

(7)—for administrator—Whether guarantee continuing one—Extent of surety's liability. See ACT V OF 1881 (PROBATE AND ADMINISTRATION), No. 8, A.W.N. (1908), 288.

(8) Liability of—S. 336, C.P.C., 1882 See CIV. PROC. CODE, No. 165-b, 143 P.R. 1908.

Surplus collections

Suit for redemption decreed—Second suit, for surplus collections made by mortgagee during mortgage, not maintainable—Right to claim such collections synchronous with right to redeem mortgaged property. See MORTGAGE (REDEMPTION), No. 9, 5 A.L.J. 192.

Survey Map.

—and map for private purposes—Comparative value as evidence See FISHERY, No. 1, 12 C.W.N. 334.

Takarridar.

- (1) *Takarridar—Succession to his holding by his adopted son—Claim by proprietary body of Mauza Talwandi, Tehsil Dina Nagar, District Gurdaspur—Land entered as Shamilat Deh—Charitable gift—Muafi—Occupancy tenant—No analogy between Takarridars and Mukarridar of Rawalpindi—Punjab Tenancy Act (XVI of 1887), Ss. 5, 6 and 59.*

Takarridar—(Concluded).

In 1829 A.D. one S acquired some land as a charitable gift (Dharm Arth) from the Sikh Government.

In 1850, S received Musafi grant from the British Government for his life.

In 1875, on his death the grant was resumed and an engagement for payment of revenue at full rates was made with his son R, and he was recorded as *Takarridar* in the proprietary column paying a small amount of rent (Malikana) to the proprietary body. This entry was repeated in the last settlement of 1890-91 and was continued till R's death in 1901 when mutation was effected in favour of R's adopted son K.

Held that, the term *Takarridar* is neither defined in the Punjab Tenancy Act (XVI of 1887) nor it falls within the definition of various tenants detailed therein.

Held, also, that under the above circumstances, *Takarridar* occupies the position of a proprietor and not that of an occupancy tenant, and his adopted son is entitled to succeed him.

Per Kensington, J.—R could establish occupancy rights under S 5 of the Punjab Tenancy Act.

The mere fact that the land has all along been shown in the settlement record as *Shamilat Dch* proves nothing, especially as in 1890 Settlement Record R was entered in the column for proprietors.

R's *Takarridar* tenure has no analogy to that of *Mukarridar* of Rawalpindi District as explained in (a). **Budha Singh v Kanshi Ram**, 120 P.W.R. 1908.

KENSINGTON AND LAL CHAND, JJ.

Reference —(a) 10 P.R. 1896, R.

Talukdar.

Rules of succession applicable to non-talukdari property—Acquisitions by talukdar—Succession See SUCCESSION, No. 1, 11 O.C. 256.

Tanki-tenure

Revenue-sale—Act VII of 1868 (P.C.), Ss. 1 and 14—Ejectment—Act XI of 1859, S. 29—Subsisting title at the date of suit—Recognition of title as *tanikdar*, if sufficient to give right of suit—"Revenue"—"proprietor"—Amount due from *tanikdar* and payable to Government—Sale by Collector for Government dues, if legiti—*tanik-tenure*, nature of settlement—See LANDLORD AND TENANT, No. 15, 7 C.I.J. 160.

Taveris.

—, members of divided, of *tarwad*, whether bound by execution proceedings, to which they were not party, obtained against Karnavan of original *tarwad*. See MALABAR LAW (TARWAD), No. 1, 3 M.L.T. 189.

Taxation.

Attorney's application for—of his bill of costs for business not transacted in Court, power of Judge to make order on. See HIGH COURT RULES (BOMBAY), No. 6, 10 Bom. L.R. 76.

Tenancy Act.

(1) See ACT VIII OF 1885 (BENGAL).

(2) See ACT IX OF 1883 (C. PROV.).

(3) See ACT XI OF 1898 (C. PROV.).

(4) See ACT IF OF 1901 (N.W.P.).

(5) See ACT XVI OF 1887 (PUNJAB).

Tenancy Validation Act.

See ACT I OF 1903 (BENGAL).

Tenant.

(1)—by sufferance, whether representatives of, can be converted, without their own consent, into such, by mere assent of lessor—Such representative holding over after death of—whether a trespasser. See TRANSFER OF PROPERTY ACT, No. 79, 18 M.L.J. 26.

(2)—, whether representative of tenant by sufferance, who enters after his death, is a, within meaning of Art 139. See LIMITATION ACT, No. 109, 18 M.L.J. 26.

(3) See *LIASK*.

(4)—, right of, to prove that title of registered purchaser of zemindari, claiming rent, was declared void by competent Court. See ACT VIII OF 1885 (BENGAL TENANCY), No. 11, 12 C.W.N. 622.

(5) Mortgage by fixed rate tenant—Suit by zemindar to redeem it on death of such tenant without heirs—Zemindar not a person having "interest" in property. See TRANSFER OF PROPERTY ACT, No. 63, A.W.N. (1908), 210.

(6)—does not include rent-free grantee within S 32, cl. 2, Agra Tenancy Act. See ACT II OF 1901 (N.W.P. TENANCY), No. 2, 5 A.L.J. 734.

(7) See LANDLORD AND TENANT.

Tender.

(1) Conditions of valid tender—Risk in tender. See TRANSFER OF PROPERTY ACT, No. 44, 10 Bom. L.R. 208.

Tender—(Concluded).

(2) Condition of proper — See CONTRACT ACT, No. 1, 4 M.L.T. 335.

(3)—, calling of, if necessary in the case of grant of lease containing a covenant. See SPECIFIC RELIEF ACT, No. 13-a, 13 C.W.N. 129.

Thakbust Maps.

(1)—, *evidentiary value of—Statement recorded in presence of parties—Effect*

The presence at the preparation of, and the signing by the parties or their agent of, a *thakbust* map may fairly be taken to be an admission by the parties of the boundary lines between adjoining villages.

In this case the dispute was whether certain land belonged to the estate of the plaintiff or to that of the defendant. Plaintiff produced *thakbust* and survey maps for 1852 to 1853, the former containing a statement in support of his case. The defendant produced a survey map of the years 1855 to 1856, in support of his case, but failed to produce any *thakbust* map of the same year. It was found that the predecessor of the defendant had full notice of the *thakbust* proceedings, that he objected to the boundary line as laid down in the plaintiff's map between their estates, and that the objection was disallowed.

Held, that the evidentiary value of the *thakbust* map and the survey maps produced on behalf of the plaintiff was greater than that of the survey map produced on behalf of the defendant. **Dunne v. Dharani Kantha Lahiri**, 35 C. 621.

MITRA AND CASPERSEZ, JJ.

References — 2 W.R. 210, 21 W.R. 115, 9 C.L.R. 305, 8 C. 975, 7 C.W.N. 849, 16 C. 186, 30, 291-30 I.A. 44, R.

Timber.

(1)—of particular description, grant of right to fell—Interest in soil itself not granted—Grant of valuable forest rights—no sale of—Standing—moveable property—S. 3, Indian Registration Act—Immoveable property—Ss 3 and 4, General Clauses Act. See ACT VIII OF 1885 (BENGAL), No. 24, 7 C.L.J. 152.

(2)—, *zemindar* generally owns, on tenant's holding—Tenant has no right to cut and remove such timber—Zemindar not entitled to interfere with tenant's enjoyment of trees on his holding during subsistence of relationship of landlord and tenant. See LANDLORD AND TENANT, No. 1, 5 A.L.J. 99.

Title.

(1) Intention of parties that title should pass—Whether want of consideration will prevent it from passing—Intention of parties that some, though not what the deed purported to pass, title should pass—Effect. See *SALF*, No. 3, 4 M.L.T. 279.

(2)—not distinctly stated in plaint or issue—Effect. See POSSESSION, No. 8, 4 M.L.T. 341.

Toda giras allowance.

(1) *Toda giras allowance—Execution of decree—Attachment and sale of the allowance—What interest in the allowance is attachable—Civil Procedure Code (Act XIV of 1882), S. 266—Bombay Act (VII of 1887), "S. 5—Likely to become due"—Interpretation.*

A decree holder, in execution of his decree, applied for the attachment and sale of a *toda giras* allowance, which the judgment-debtor was entitled to receive periodically from the Government treasury, and which was to become payable to him during the twenty years following the application. The lower Courts held that the life-interest of the holder, computed at its valuation for twenty years, could be attached and sold in execution of the decree —

Held, reversing the order, that it is clear from the language of S. 5 of Bombay Act VII of 1887, that it is not the life-interest of the judgment-debtor in a *toda giras* allowance but something short of it that is allowed by the Act to be attached.

The words "money likely to become due" must be restricted to the case when, for instance, during the life time of the judgment-debtor, a sum of money is directed by the Collector to be paid to him on account of a *toda giras* allowance, not immediately, but on a date subsequent to the date of the order of direction, and the judgment-debtor dies before that date, and to other cases of a similar character.

Under what circumstances money is likely to become due on account of a *toda giras* allowance is a question which cannot be answered exhaustively and must depend on the facts of each case as it arises. **Amarsang Maysang v. Jethalal Maganlal**, 10 Bom.L.R. 1201.

CHANDAVARKAR AND HEATON, JJ.

Tort.

(1) *Negligence—Allowing storm-water to flood another's land.*

Tort—(Continued).

A Municipality constructed a dam in a creek but by allowing a ditch, which was connected with the creek and which drained away rain water, to be filled up with rubbish of the town and the sluices at the dam to be choked up with weeds, silt, and such other things, the rain water collected in the creek was carried away and flooded the plaintiff's property.

Held, that the Municipality was liable for the nuisance; since it turned their works by their negligence into a nuisance (a) **Rajendralal Maneklal v. Surat City Municipality**, 10 Bom. L. R. 198

CHANDAVARKAR AND KNIGHT, JJ.

References —(a) 1 App. Cas. 256, F., (1895) A.C. 433, 20 T.L.R. 254, R.

(2) *Injury done to plaintiff's land by retention of water on defendant's land—Such water not brought by any act of defendant*

Water was not brought on defendant's land by any act of his, but water which flowed on one portion of his land for the purpose of protecting another portion of his land, was retained by him, and as a result of such retention, damage was caused to the land of the plaintiffs which adjoined

Held, under the circumstances, that the retention of water on defendant's land in order that it might not flow to another part, is not an act done in the natural and ordinary course of the enjoyment of property which would protect him from being liable in damages to the plaintiffs, if injury had been done to his land **Ramanuja Chariar v. Krishnaswami Mudali**, 3 M. L. T. 368=31 M. 169.

WHITE, C. J. AND MILLER, J.

Reference —2 B. 472, D

(3) *Suit against joint tort-feasors—Compromise between plaintiff and one defendant—Such compromise no bar to a decree against the other defendants.*

The plaintiff sued several defendants jointly to recover damages in respect of an alleged assault committed on him by the defendants, but entered into a compromise with one of the defendants. *Held* that this compromise did not preclude the plaintiff from recovering damages against the other defendants. **Ram Kunwar v. Sheikh Ali Husain**, A.W.N. (1908), 190.

RICHARDS, J.

Reference —7 Sc. and L. 547, D.

Tort—(Continued).

(4) *Whether action for libel or slander will lie against accused persons defending themselves—Whether reply to notices of action are privileged—Libel—Defamation.* c

No action of libel or slander lies whether against Judges (a), counsel (b), witnesses (c), or parties for words written or spoken in the ordinary course of any proceeding before any Court or tribunal recognised by law. The principle on which this rule is based would seem to apply also to an accused person, as it is essential to the administration of justice that those who are protecting their own interests should be under no apprehension of any proceeding from the opposite party (d).

A reply to a notice of action will be privileged, so long as it is confined to the matter in hand, is relevant and is not published. **A. P. Pachaiperumal Chettiar v. Dasi Thangam**, 18 M. L. J. 353 4 M. L. T. 222=31 M. 400.

BENSON AND SANKARAN NAIR, JJ.

References —(a) 17 M. 87, R. (b) 10 M. 28 (35), R. (c) 30 M. 222, R. (d) 4 Campb. 211, R.

(5) *Execution of decree for rent due Third person's property sold in execution—Third person suing decree-holder for damages—Decree-holder liable, not for negligence, but for wrongful act—Whether third person concluded by estoppel.*

H, rented a *serai* from B, the defendant, for storing his machinery. He rented the *serai* for four months, paying one month's rent in advance. The plaintiff, with the permission of H, stored his turbine in the same place. Subsequently, H removed his machinery, but the plaintiff's turbine remained in the *serai*. The defendant sued H, for rent unpaid and got an *ex parte* decree against H, in execution of which he sold up the plaintiff's turbine. The plaintiff then sued the defendant for the value of the turbine;

Held that the suit could not be considered as an action for tort on account of negligence, but that the defendant was accountable to plaintiff in damages, though his wrong-doing was unintentional, as on an action for conversion. The question of contributory negligence could only arise in the case of an action based on negligence. The plaintiff's neglect, in so far as it excused the defendant's wrong-doing, could only be taken into account in assessing damages, by requiring the plaintiff to prove strictly the damage suffered by him.

Tort—(Concluded).

On the question whether the plaintiff was estopped by his conduct from alleging the turbine to be his and whether he should be held to have represented it to belong to H, held that there was no representation by the plaintiff on which any reasonable man could hold that the turbine belonged to H, and that the plaintiff by omitting to notify the goods to be his could not be held to have intentionally permitted the defendant to believe the turbine to be H's, and that he was not, therefore, estopped from alleging it to be his **Parmeshari Das v Basheshar Nath**, 129 P R. 1908.

CLARK, C J., AND REID, J.

References —(a) 5 B.L.R.App. 71, 3 B. 74, 3 B.L.R. 413, and 11 B.H.C.R. 46, R (b) 20 C. 296 (P.C.), F.

(6)—committed by a Hindu father—Decree for damages against the father—Son's liability under the decree See **HINDU LAW (DEBTS)**, No. 5, 10 Bom L.R. 297

(6-a) See **TRESPASS**.

(7) Damage to two persons caused by same tortious act—Right to sue as joint plaintiffs. See **CIV. PRO. CODE**, No. 330, 1 Sind L.R. 181.

(8) Wrongful attachment of partnership property—Right of individual member to sue for damages. See **PARTNERSHIP**, No 14, 2 Sind. L.R. 26 . .

Tout.

(1) District Magistrate declaring a person to be a tout—Procedure—Personal inquiry necessary—Opportunity to show cause. See **ACT XVIII OF 1879 (LEGAL PRACTITIONERS)**, No 2, 12 C.W.N. 842.

(2) Declaring a person to be tout—District Judge to take evidence himself—Power to direct Munsif to take it—Opportunity to show cause—Procedure when Munsif suspects a person to be a tout. See **ACT XVIII OF 1879 (LEGAL PRACTITIONERS)**, No. 7, 12 C.W.N. 843 (Note).

(3) Order declaring certain persons to be touts—Application to High Court under S. 15, 24 and 25 Vic., Cap. CIV—Application to Division Bench—Whether Bench competent to dispose of application. See **ACT XVIII OF 1879 (LEGAL PRACTITIONERS)**, No. 8, A.W.N. (1908), 279.

Tower of silence.

Grant of land for, within cantonment limits. See **NATIVE STATES**, No. 1, 12 C.W.N. 465.

Trade.

Trade protective society's business, if conducive to public welfare, See **LIBEL**, No. 2, 12 C.W.N. 1053 (P.C.)

Trade-mark.

(1) *Passing of goods—Admissibility of evidence of intent—Intent to deceive*

The general principle applicable to passing off cases is that "no body has the right to represent his goods as the goods of somebody else" (a). In an action for an injunction to restrain the trade-mark, or mark if the defendant's goods on the face of them and having regard to the surrounding circumstances are calculated to deceive, evidence to prove the intention to deceive is inadmissible as being unnecessary the "rule being that a man must be taken to have intended the reasonable and natural consequences of his own acts" Where the defendant adopted a trade-mark identical with that of the plaintiff, which trade-mark was calculated to deceive and there was evidence to show, that some person was actually deceived, held, the plaintiff, was entitled to succeed without a necessity for him to prove an intention to deceive (b) and to obtain an injunction (c). **Munna Lal Serowjee v. Jawala Prasad**, 35 C 311

FLETCHER, J

References —(a) (1896) A. C. 199, F. (b) 1 Ch 893, F. (c) 1 Ch 135 and 1 Ch. 211, R.

(2) *Breach—Right of manufacturer to sue—Title of assignee of trade-mark without business—Pleadings—Statement by plaintiff not admitted by defendant—Proof*

It is title law that an assignment of trade-mark, without the business, confers no effective right.

An action for breach of trade-mark does not lie at the instance of the manufacturer who supplies articles, when another firm carries on the actual business with the articles supplied.

The manufacturer may be interested in the success of the firm which *de facto* carries on the business, but this cannot put him in the shoes of the latter in vindicating the latter's right against wrong-doers.

Where a statement by a plaintiff is not admitted by the defendant, the plaintiff, if he ignores the point, does so at his peril, for the defence puts him to prove his title. **J. Ullman & Co. v Cesar Leuba**, 13 C.W.N. 82.

LORDS ROBERTSON, ATKINSON, COLLINS, AND SIR ARTHUR WILSON.

Trade-mark—(Concluded)

(3) Defendant infringing certain combination of letters, designs, and numerals as forming plaintiffs' trade description—Exclusive right of plaintiffs by user and reputation—Imitation, whether likely to mislead ordinary purchasers. See ACT IV OF 1899 (MERCHANDISE MARKS), No. 1, 4 M.L.T. 866.

Traller cars.

—whether vehicles with springs "propelled by electricity," within the meaning of Sch. VI, Cl. 1 of the Madras City Municipal Act, 1904. See ACT III OF 1904, (MADRAS CITY MUNICIPALITIES), No. 2, 18 M.L.J. 119.

Transfer.

(1) *Transfer for illegal purpose—Illegal purpose never carried out—Right of vendor or his heirs to recover property transferred—Condition for exercise of right—Burden of proof in such a case—Trusts Act, 1882.*

Where certain owners of property transferred it for the illegal purpose of defeating creditors, which purpose was never carried into execution

Held that the vendor could not recover the property from the vendee in possession, without proving that the fraudulent purpose of the parties to the sale was never carried out, and that the vendor's heirs were in no better position than the vendor. The words of S. 81 of the Trusts Act, 1882, clearly indicate that it is for the plaintiffs to make out that the fraud never got beyond the state of intention, and, in the present case, the defendant having the benefit of possession, the maxim "*in pari delicto potior est conditio possidentis*" applies. **Ragho Atmaram v. Purshotam Jairam**, 4 N.L.R. 26.

DRAKE-BROCKMAN, O.C.J.

References.—(a) 29 M. 223 (225), 23 C. 460 (474), R.

(2) Validity and effect of—of immovable land—Reg. VI of 1831—Subsequent enfranchisement, effect of. See **INAM**, No. 2, 3 M.L.T. 243.

(3) —for illegal purpose not carried into execution—Contract to sell by transferee—Suit for specific performance of contract—Right of the transferor to resist suit on the ground that transfer was benami. See **BENAMI TRANSACTIONS**, No. 1, 3 M.L.T. 241.

(4) Conditions under which—by absolute occupancy tenant of his holding can be avoided. See ACT IX OF 1883 (TENANCY ACT (CENTRAL PROVINCES)), No. 2, 1 N.L.R. 45.

Transfer—(Concluded).

(5)—of moveables—Grantee under contract having no right to soil obtains right to fell trees—No stipulation for beneficial use of soil—License to enter and take trees away. See ACT VIII OF 1885 (BENGAL), No. 24, 7 C.L.J. 152.

(6)—of Judge who had given decision on some question only—Successor's giving judgment contrary to predecessor's not proper, though not illegal, especially where appeal lies—Successor to re-open decided question only when error is obvious and patent. See **MORTGAGE (REDEMPTION)**, No. 3, 41 P.L.R. 1098.

(7) Husband's debts—Wife satisfying them in his life-time—Voluntary payment—Transfer of husband's property after his death—Transfer not for payment of debts and not binding on heirs—Equity—Inability to pay the consideration money. See **HINDU LAW (DEBTS)**, No. 6, 5 A.L.J. 339.

(8)—of occupancy holding, not transferable by local custom or usage, not void—Binding on the parties and persons claiming through them—Voidable only at landlord's option. See **OCCUPANCY HOLDING**, No. 3, 12 C.W.N. 1086.

(9)—of chance of an heir apparent, validity of—Mutation of names or transfer of possession cannot pass title, where registered deed is required. See **TRANSFER OF PROPERTY ACT**, No. 3, 11 O.C. 301.

(10) Validity of judgment written after transfer of Judge. See **CIV. PRO. CODE**, No. 107, 13 C.W.N. 682.

Transfer of Property Act.

(1) Ss. 3, 55 and 56—Vendor's lien for unpaid purchase-money—Sale-deed containing full acknowledgment of purchase-money—Mortgagee taking the mortgage without notice of unpaid purchase-money—Estoppel. See **SALE**, No. 1, 10 Bom. L.R. 403.

(1-a) S. 5 (b)—See Nos. 22, *infra*.

(2) S. 6—*Hindu law—Transfer by a Hindu reversioner of his reversionary interest.*

Held, that it is not competent to a Hindu reversioner to transfer his reversionary interest expectant on the death of a Hindu widow. **Jagan Nath v. Dibbo**, A.W.N. (1908), 284.

RICHARDS AND GRIFFIN, JJ.

Reference—25 I.A. 183=21 A. 71, F.

(3) S. 6 (a)—*Estoppel—Recital in a deed, effect of, in an action collateral to it—*

Transfer of Property Act—(Continued).

Promise—Transfer of the chance of an heir-apparent, validity of—Mutation of names
—Possession, transfer of—Evidence Act,
S. 115.

Held, that a transfer of the chance of an heir-apparent succeeding to an estate is invalid and cannot operate to transfer any interest in the property (a).

Held further, that neither mutation of names nor transfer of possession can pass any title where the law requires a registered deed (b)

Where a distinct statement of a particular fact is made in a recital of a bond and a contract is made with reference to that recital, *held*, that the party making the statement would not be estopped from disputing the fact so admitted in an action not founded on the deed but wholly collateral to it (c).

Held also, that a promise not being a representation as to an existing fact, cannot by itself be the foundation of an estoppel.—**Bajrang Singh v Bhagwan Bakhsh Singh**, 11 O.C. 301

CHAMBER, J C

References —(a) 31 B. 165, F. 31 C. 667, 13 C. 262, 10 A. 133; 29 A. 163, 10 H.L.C. 191; 19 Ch. D. 342 and L.R. 13 A.C. 523, *It.* (b) 26 C. 81, *It.* (c) 14 A. and E. 781, 6 H. and N. 520, R; L.R. 2 Ch. D. 72, *approving* 8 M. and W. 209, *F.*

(4) *S. 6 (a).—Widow suing for declaration of her absolute ownership under husband's will—Alleged reversioners entering into razinamah acknowledging her absolute rights—Subsequent release by such reversioners—Whether release anything more than agreement not to disturb—Whether compromise a transfer of a spes successionis.*

As a right must always be on the one side or the other, the fact that the right is on his side is not by itself sufficient for a party to set aside a compromise entered into by him on the supposition of a doubtful right.

There is nothing illegal in a Hindu widow acquiring full ownership in any property under a will; and a *razinamah* or decree recognising that right is, therefore, not illegal.

A Hindu widow brought a suit, as the sole owner of her husband's property under his will, against her husband's brother and some others, who were executors under the will, for a declaration that she had become solely entitled to the possession of the property and for other

Transfer of Property Act—(Continued).

reliefs. A *razinamah* was entered into by which the suit property was acknowledged to be the absolute property of the widow in accordance with the terms of the will. A decree was passed in accordance with the terms of the *razinamah*, and a deed of release was executed by the reversioners. A suit was brought to recover these properties by the son of the testator's brother, as reversioner, alleging that the *razinamah* was invalid for misrepresentation and coercion.

Held, that the acceptance of the release deed was not an acknowledgment of the existence of any right in the releasor, but amounted only to an agreement (a) not to disturb the widow in the enjoyment of the property absolutely and that there was nothing to countenance the view that the *razinamah* and the release should be treated as effecting a transfer of only a chance of succession or *spes successionis* to the widow, which was incapable of transfer by virtue of S. 6 (a), Transfer of Property Act, and, therefore, illegal and invalid. **Olati Pulliah Chetty v E. Varadarajulu Chetti**, 18 M.L.J. 469.

WHITE, C.J., AND SANKARAN NAIR, J.

References —(a) 2 Sch. and Lefr. p. 68, *It.*, 30 M. 256, 24 M. 265, 26 M. 31 and 28 M. 84, *D.*

(5) Ss. 19 and 21—"Vested" and "contingent" defined. See REGISTRATION ACT, No. 3, 89 P.R. 1908

(5-a) S. 21—See No. 5, *supra*

(6) S. 41—Suit for pre-emption—Decree for foreclosure on a mortgage by ostensible owner—Effect on right of pre-emption. See PRE-EMPTION, No. 25, 11 O.C. 26

(6-a) S. 41—See No. 8-a, *infra*.

(7) *S. 43—Estoppel—Representation—Transferor—Subsequent acquisition of rights*

The rule of law underlying S. 43 of the Transfer of Property Act is that, as between the transferor, and the transferee, the transferor cannot plead subsequent title to the land transferred, if he had induced the transferee to pay money for the transfer. The principle is an extension of the rule of estoppel.

Where a person who had merely a *ghatwali* interest in certain land mortgaged it on the representation that it was his *jagir*, and he subsequently got a *moharari* title to it.

Held, that on a decree for sale upon the mortgage, the *moharari* interest of the mortgagor

Transfer of Property Act—(Continued).

passed to the mortgagee. **Mokhoda Debi v. Umesh Chandra Banerjee**, 7 C.L.J. 381.

MITRA AND CASPERSZ, J.J

(8) *S. 13—Mortgage—Decree for sale—Portion of property comprised in a mortgage acquired by mortgagor subsequently to decree.*

The whole of a certain house was mortgaged, the mortgagor having at the time an interest in only a fractional share in it. The mortgagee sued, and obtained a decree for the sale of the whole house. After that decree was passed and partially executed, the mortgagor in virtue of a partition acquired the remaining interest in the house. *Held*, that section 13 of the Transfer of Property Act applied and that the decree-holder was competent to continue execution of his decree against the mortgagor's after-acquired interest. **Durga Das v. Muhammad Ismail**, A.W.N. (1908), 155.

BANERJI, J.

Reference—18 M. 192, 4.

(8-a) *Ss. 43 and 41—Rights of sub-mortgagee—Whether sub-mortgage is transfer of immoveable property—Equitable mortgage—Preference over legal mortgage, where latter is not taken with notice of prior charge—Notice, actual or constructive*

A sub-mortgagee has not merely the rights against the mortgage debt. A sub-mortgage comprises, (a) the personal covenant of the sub-mortgagor, (b) the transfer of the original mortgage debt and mortgaged property with the benefit of all powers and remedial clauses contained in the original mortgage and (c) in English mortgages a power of sale.

Held, therefore, that a man who assigns a mortgage or sub-mortgages, does transfer immoveable property within the meaning of S. 43 of the Act.

The mere fact of a person depositing certain title-deeds with another is sufficient evidence of a representation that he was authorised to transfer the property to which the deeds refer.

S. 43 protects a purchaser or transferee for value without notice, and there is no such provision in this as found in S. 41, requiring the transferee to take reasonable care to ascertain the power of his transferor to give a clear title.

There is no authority for the proposition that a transferee is to be imputed with notice under

Transfer of Property Act—(Continued).

S. 43, if he has not exercised the utmost care in investigating his transferor's title.

Equitable mortgages are not entitled to preference over legal mortgages, unless the latter be taken with notice of the prior charge, and such notice may be either actual or constructive. And a person must be held to have had constructive notice of a prior mortgage, if such mortgage would have come to his knowledge, had he exercised the diligence of an ordinarily prudent man, and if the facts show that he did not exercise such diligence. **Maung Ba Tin v. Maung Po Kin**, 14 Bur. L.R. 329.

MOON, J.

(9) *S. 50—Lessor and lessee—Payment of rent by lessee in good faith—Liability of the lessee to pay rent to the rightful owner.*

On the 14th December, 1895, S went into possession of certain property as mortgagee, and on the same day he let the property to the defendant for twelve years. S after some years died, and his interest as mortgagee survived to his younger brother R. Thereafter R died, and since then S's widow G took possession of the property and managed the same, and got her name placed on the *khata* as the owner of the property. She also recovered rent from the defendant for the years 1902 and 1903. The person who was really entitled to the property at R's death was his sister, the plaintiff. She sued to recover rent for the years 1902 and 1903 from the defendant on the ground that G had no authority to receive rent and give a discharge for the same. It was found that the defendant in making the payment to G had acted in good faith and had no notice of the plaintiff's interest in the property.

Held, that the defendant was not chargeable with the rent sued for, as S. 50 of the Transfer of Property Act, 1882, applied to the case.

The language of S. 50 is general. It applies even to cases where there has not been an assignment by the lessor during the tenancy. **Kaveriamma Putta Hegde v. Lingappa Rama**, 10 Bom. L.R. 1190.

BASIL SCOTT, C.J. AND CHANDAVARKAR, J.

(10) *S. 51—Vendee compelled to give up land, purchased by him, belonging to widow owning life estate—Value of improvements effected by him in good faith to be given to him. See HINDU LAW (ALIENATION), No. 2, 17 M.L.J. 622.*

Transfer of Property Act—(Continued).

- (11) *S. 52—Lis pendens—Sale during the pendency of suit—Service of summons not effected—Effect of*

When, after the institution of a suit for pre-emption, the vendee sells the property, the sale cannot, having regard to the provisions of S. 52, Transfer of Property Act, affect the right of the plaintiff, to the decree which he might have obtained in the suit, as the purchaser takes the property subject to the result of the suit (a) The fact that the vendee sells the property before service of summons does not make S. 52 inapplicable (b). **Ghasitey v. Gobind Das**, 5 A. L.J. 477 = A.W.N. (1908), 221.

STANLEY, C. J., AND BANERJI, J.

References —(a) 27 A. 544, D (b) 29 A. 339, R.

- (12) *S. 52—Transfer after decree and before appeal filed lis pendens—Appeal—Final decree*

The function of an appellate Court is not under the Code of Civil Procedure (1882), the final decree in the case, and the proceedings in the appellate Court must therefore be treated as a continuation of the proceedings in the lower Court.

It is not open to a defeated suitor to file an appeal immediately as he has to obtain copies of the decree and judgment and he ought not to suffer for the delay imposed by law. There is no reason why this delay should prejudice him in this respect any more than the delays due to adjournments or stay of proceedings.

The law of *lis pendens* in this country is founded on the necessity, if possible, of a final adjudication, and it is unjust that a plaintiff should be prejudiced by any acts of the defendant subsequent to the institution of the suit and with notice thereof. **Setta Goundan v. Muthai Goundan**, 4 M.L.T. 77 = 31 M. 268.

MUNRO AND SANKARAN NAIR, JJ.

References —20 W.R. 205 and 28 C. 23, F.

- (13) *S. 52—Mortgage suit, if a suit in respect of an interest in immoveable property—Contentious suit.* See *LIS PENDENS*, No. 1, 8 C.L.J. 153.

- (14) *S. 53—Defeating or delaying creditors—Considerations for transfer separable—If whole transfer void—Onus of proof—Prima facie case—Weakness of adversary's case.*

Transfer of Property Act—(Continued).

A transfer of property, the considerations for which are separable, part being for valuable consideration and part for the intention to defeat or delay other creditors, is valid and enforceable with regard to the part which is for valuable consideration.

A mortgage was executed for a total sum of Rs. 8,500. It was found that Rs. 4,853 was actually advanced by the mortgagees, the evidence as to the balance, Rs. 3,647 was extremely suspicious and seemed to be for the purpose of delaying another creditor who had obtained a decree on a *bachchitta*.

Held, there ought to be a mortgage decree on the footing of Rs. 4,853, being the principal money secured (a).

The party, on whom the onus of proof lies, must, in order to succeed, establish, at least, a *prima facie* case. He cannot, on failure to do so, take advantage of the weakness of his adversary's case. **Rajani Kumar Das v. Gour Kishore Saha**, 7 C.L.J. 586 = 12 C.W.N. 761.

MITRA AND CHATTERJEE, JJ.

References —(a) 24 C. 825 and 23 M. 184, R.

- (15) *S. 53—Good faith—Transfer not in good faith voidable even though with consideration—Single creditor entitled to maintain proceedings to avoid fraudulent transfers.*

Held that, even where there is some consideration, the transaction will be avoided under S. 53 of the Transfer of Property Act if the element of good faith is not present (a). **Narmal Das v. Chet Ram**, 11 O.C. 197.

CHAMBERLAIN AND CHITVAN, JES.

References —(a) 30 M. 34 C. 909, R.

- (16) *S. 53—Whether mortgagor can take objection under—*

The mortgagors cannot take the objection that the mortgage was to defeat or delay creditors. Such objection can be taken only by the creditors. **T. P. Asan Kani Ravuthar v. Aru, Aru, Somasundaram Chettiar**, 4 M.L.T. 66 = 31 M. 206.

WALLIS AND SANKARAN NAIR, JJ.

- (17) *S. 53—Rights safe-guarded by proviso to section. See MORTGAGE (GENERAL), No. 1-a, A.W.N. (1908), 116.*

- (18) *S. 51—Sale—Non-payment of consideration sale nevertheless complete.*

In a sale of immoveable property, non-payment of the purchase-money does not prevent

Transfer of Property Act—(Continued).

the passing of the ownership of the purchased property from the vendor to the purchaser and the purchaser can, notwithstanding such non-payment, maintain a suit for possession of the property. **Baij Nath Singh v. Paltu, A.W.N. (1908), 58 = 5 A.L.J. 96 = 30 A. 125.**

STANLEY, C.J., AND BANERJI, J.

References.—11 A. 244, 2 B. 547; and 23 B. 525, F. c.

(19) Ss. 54, 129—Transfer of immovable property by Mahomedan to his wife for dower and inheritance is a sale within S. 54, Transfer of Property Act—Not a *hiba bil ewaz*—Gift without consideration only exempted from operation of law of gifts, by S. 129 of Act. See MAHOMEDAN LAW (DOCTRINE), No. 3, 13 C.W.N. 160.

(20) S. 55—See No. 1, *supra*.

(21) S. 55, Cl. (1) (b), (4) (b)—Nature of vendor's lien—Vendor's possession whether adverse—Onus of proof.

Both in England and in India, under the Transfer of Property Act, the vendor's lien for unpaid purchase money is non-possessory. He is only entitled to retain the title-deeds and to a charge for the unpaid purchase money.

Even assuming that the onus of showing that the possession of unpaid vendor was not adverse rests upon the vendee, *held*, that, in that particular case, the onus was sufficiently discharged by the extract from the village accounts, which showed that after the conveyance, the putta was transferred in the name of the vendee (a). **Yelayuda Chetty v. Govindasamy Naicker, 17 M.L.J. 450 = 30 M. 524 = 3 M.L.T. 10.**

WHITE, C.J., AND WALLIS, J.

Reference.—(a) 11 C. 229. R.

(22) S. 55 (1) (g) and 5 (b).—See SALE, No. 2 a, 4 L.B.R. 224.

(22-a) S. 55 (4) (b)—Nature of suit by vendor to enforce charge for unpaid balance of purchase-money—Duty of vendor as prescribed by S. 55, Transfer of Property Act. See LIMITATION ACT, No. 75, A.W.N. (1908), 71.

(22-b) S. 56—See No. 1, *supra*.

(23) Ss. 56, 67, 81 and 88—Mortgage—Bona fide purchaser for value of part of the lands comprised in a prior mortgage—Right to insist on other lands being sold first—Marshalling.

Transfer of Property Act—(Continued).

On reading the two Ss. 56 and 81 of the Transfer of Property Act, it was *held*, that a purchaser of one of the lands comprised in a first mortgage has no right to insist that the other lands comprised in the mortgage should first be sold before selling the land that he purchased.

It may however be pointed out that, under S. 88 of the Transfer of Property Act, the Court may order that a portion sufficient to discharge the plaintiff's debt be sold, and if the part not sold is sufficient, and if the plaintiff cannot possibly be prejudiced by such sale, it may be open to the Court to direct in the decree itself its sale before the other property.

Further, in execution of a decree for the sale of all the lands, the lands not sold may be sold first, and if the sale-proceeds are sufficient to discharge the plaintiff's debt, the sale of the other lands may be stopped. **Kommineni Appayya v. Mangala Rangayya, 3 M.L.T. 287 (F.B.) = 18 M.L.J. 229.**

WHITE, C.J., WALLIS AND SANKARAN NAIR, JJ.

References.—5 M. 387, 11 C. 258, 17 A. 435; 31 C. 95, F. 29 M. 217; 7 A. 711, 22 B. 30 (F.B.), R.

(24) S. 58—Deed of indemnity—Property mortgaged—Hypothecation.

Certain persons sold certain property to the plaintiffs. The vendors executed a document of indemnity on the same date agreeing that, if any prior lien or charge should be disclosed, they would repay the whole money with interest, and they hypothecated certain property to secure repayment for the purchase money. The vendees were dispossessed. In a suit to enforce the hypothecation in the document of indemnity, *held*, that there was clearly an engagement which gave rise to a pecuniary liability and that the terms amounted to a mortgage within the meaning of S. 58 of the Transfer of Property Act. **Niaz Ahmad v. Mangu Lal, 5 A.L.J. 723.**

RICHARDS AND GRIFFIN, JJ.

Reference.—13 A. 28, R.

(25) S. 58—Security bond. See REGISTRATION ACT (III OF 1897), No. 1, 3 M.L.T. 317.

(26) Ss. 58, 59 and 100—Mortgage and charge, difference between. See COMPROMISE, No. 2, 7 C.L.J. 492.

(27) Ss. 58, 67 and 68—Usufructuary mortgage—Temporary sale with possession as

Transfer of Property Act—(Continued).**Security for debt—Suit for sale—Application of principles of Transfer of Property Act.**

A certain person borrowed a sum of money from plaintiff, and as security therefor, temporarily sold certain land to her with a promise to re-take it on payment of the consideration money and the vendor put plaintiff in possession. Sometime after, the borrower vendor entered on the land without the plaintiff's consent and was in wrongful possession. Plaintiff sued for a decree for ejectment and for possession or in the alternative, for recovery of the amount lent, to be paid within a time to be fixed by the Court and that, in default, the land be sold and the proceeds applied towards satisfaction of the amount decreed. *Held*, that, the transactions amounted to a usufructuary mortgage within the definition contained in S. 58 (d) of the Transfer of Property Act. Though that Act was not in force, where the land was situated the principles of that Act were applicable. Applying the principles of Ss. 67 and 68 of that Act, there could be no decree for sale.

The decree for sale passed by the Lower Court was therefore set aside and a decree ejecting the defendant and putting the plaintiff back in possession was passed. **Shwe Lok v. Ma Selk Kaung**, 4 L.B.R. 222.

HARTNOLL, J.

• *References* —11 A. 867, 24 C. 677; and 12 M. 109, R.

(28)—S. 59—S. 17 (b), *Registration Act, 1877*—*Instrument known as 'mortgage'—'Value' of right, title or interest in immoveable property created thereby—Interest does not become principal.*

For the purposes of S. 17 (b), *Registration Act*, under S. 59, *Transfer of Property Act*, as it stood in 1901, i.e., before the amending Act (No. 6) of 1904 came into force the "value" of the right, title, or interest in immoveable property created by a mortgage is the principal money secured (a). Hence in order to see whether the special kind of instrument known as a mortgage requires or does not require registration it is not necessary to ascertain what the least sum recoverable under the mortgage is (b). From the simple fact that interest is calculated in advance and made payable along with the principal at a certain specified period, it cannot be regarded as principal. The proper presumption therefore

Transfer of Property Act—(Continued).

is that the words "principal money secured" were deliberately inserted in S. 59 to show that interest is not to be taken into account. **Gama v. Lahanoo**, 4 N.L.R. 86.

H. F. STANYON, A.C.J.

References —(a) 19 C. 628; 5 A. 447 (451); 10 C.P.L.R. 10; and 21 M. 141, *relied on*. (b) 5 M. 119, and 23 M. 105, D, 10 C. 82, 26 C. 179; 2 B. 253; 3 Bom. L.R. 138, N.

(29) S. 59—*Attestation, when valid—Indian Succession Act, S. 50.*

There is no attestation unless the act of signing by the person who executes the document is done in the presence of the attesting witnesses. The thing must be done in the presence of the man who in future will be able to testify that it was done.

The provisions of S. 50, cl. (3) of the *Succession Act* cannot be made applicable to other Acts as though they appeared in an *Interpretation Act*. Those provisions have a special history and follow the provisions of the *Wills Act, 1 Vic. C. 36*; and it would not be justifiable to apply them to other Acts. **Shamu Pattar v. Abdul Khadir Rayathen**, 3 M.L.T. 300=18 M.L.J. 219=31 M. 215.

WALLIS AND SANKARAN NAIR, JJ.

References —26 C. 246, 27 C. 190, 33 C. 864; 7 C.W.N. 160, F; 27 B. 91; 26 A. 69, *Disc.*

(30) S. 59—*Deed—Execution of deed—Absence of attestation—Signature by the writer of the deed—Signature by Registrar under S. 63-A of the Dekkhan Agriculturists' Relief Act (XVII of 1879)—Not valid attestations.*

A deed of mortgage bore at its conclusion the signature of the writer of the deed and also the signature of the Sub-Registrar under S. 63-A of the *Dekkhan Agriculturists' Relief Act, 1879*. It was not separately attested by two witnesses as required by S. 59 of the *Transfer of Property Act, 1882*.

Held, that neither the one nor the other signature can be treated as an attestation: and the deed, therefore, was not validly executed.

An attesting witness is a witness who has seen the deed executed and who signs it as a witness (a). **Ranu Shivji Barate v. Laxmanrao Krishna**, 10 Bom. L.R. 943.

SCOTT, C.J., AND CHANDAVAKAR, J.

Reference :—(a) 10 C. and F. 340, F. 3763—6Q

Transfer of Property Act—(Continued).

(31) *S. 59—Zurpeshgi Patta—Attestation—Document executed by purdannahin lady.*

Where it appeared, from the evidence of the attesting witnesses to a *Zurpeshgi patta* executed by a *purdannahin* lady, that the witnesses were present in the room where the lady signed the document, but that she was behind a *purda* or screen at the time when she actually affixed her signature,

held—per Brett, J.—that, having regard to the custom of this country, there was a sufficient compliance with the provisions of S. 59 of the Transfer of Property Act (a).

Held, on appeal under the Letters Patent, (*Rampini, C.J. and Mitra, J.*)—that there was nothing to show that the attesting witnesses did not see the lady sign the deed, and that, moreover, the Court could not interfere at this stage with the concurrent findings of three Courts on a question of fact. **Harmongal Narain Singh v. Ganaur Singh**, 13 C.W.N. 40.

RAMPINI, C.J. AND MITRA, J.

References:—27 C.190; 4 C.L.J.41, 16 C. 19, R.

(31-a) *S. 59—See No. 26, supra.*

(32) *Ss. 59, 100—Instrument invalid as a mortgage for want of attestation—No charge created under S. 100.*

An instrument, which cannot operate as a mortgage for want of due attestation as required by S. 59 of the Transfer of Property Act, does not operate as a charge under S. 100 of the Act. **Samoo Patter v. Abdul Sammad Saheb**, 31 M. 337.

WALLIS AND SANKARAN NAIR, JJ.

References:—33 C. 985, F, 7 Bom. L.R. 934, R; 17 M.L.J. 39; and 24 M. 397, Cons.

(33) *S. 65—Mortgagee knowing all circumstances of mortgage—Implication of contract.*

The contract which was said to have been broken in this case was a contract to be implied by reason of S. 65 (a) of the Transfer of Property Act. The contract in question was only to be inferred in the absence of a contract to the contrary. It was found however that the appellant (mortgagee) knew all the circumstances when he took his mortgage.

Held, it was reasonable to infer that there was an understanding between the parties that the mortgagor did not contract in the terms of S. 65 (a). **Parasurama Patter's son Krishnan v. Kunhunn**, 4 M.L.T. 487.

MUNRO AND PINNEY, JJ.

Transfer of Property Act—(Continued).

(33-a) *S. 67—See Nos. 23 and 27, supra and No. 71, infra.*

(34) *Ss. 67 and 99—Money decree in favour of mortgagee—Transferee of money decree—Sale of mortgage property—Ss. 232 and 233 of the C.P. Code—Attachment of mortgage property for money decree.*

A transferee of money-decree obtained by a mortgagee is prohibited from selling the mortgaged property in execution of such decree, as the transferee, by virtue of Ss. 232 and 233 of the Civil Procedure Code, takes the decree subject to the conditions prescribed in S. 99 of the Transfer of Property Act. The fact that it is not open to the transferee to institute a suit, under S. 67 of the Act, as he is not the mortgagee, does not relieve him from the condition of not bringing it to sale otherwise than under S. 67 of the Act (a).

There is nothing in S. 99 of the Act to prohibit the attachment of mortgaged property. **Jeevarathanam Moodaliar v. Srinivasa Moodaliar**, 17 M.L.J. 503=3 M.L.T. 107—'11 M. 33.

BENSON AND WALLIS, JJ.

References —(a) 27 A. 450, Diss. 9 Bom. L.R. 728, Appr., 22 C. 813, R.

(35) *Ss. 67 and 99—Sale of mortgaged property otherwise than under S. 67—Void or voidable—Remedy by application or suit—Jurisdiction—Right of redemption—Civil Procedure Code, S. 244—Sale, confirmation of*

Held (by the Full Bench), that a sale held in contravention of the provisions of S. 99 of the Transfer of Property Act is not a nullity, but an irregular and voidable sale.

Such a sale can be avoided by an application under S. 244, Civ. Pro. Code, before or after confirmation of the sale, on the ground that the provisions of S. 99 of the Transfer of Property Act have been contravened; but, if the application is made after confirmation, the applicant has to prove further that, owing to fraud or other reasons, he was kept in ignorance of the sale proceedings and the proceedings preliminary to sale. **Ashutosh Sikdar v. Behari Lal Kirtuaia**, 11 C.W.N. 1011 (F.B.)=6 C.L.J. 920=35 C. 61.

RAMPINI, C.J., BRETT, MITRA, WOODROFF: AND MOOKERJEE, JJ.

Transfer of Property Act—(Continued).

(36) S. 68—*Mortgaged property destroyed under compulsion and security rendered insufficient—Remedy of mortgagee—Verbal agreement by mortgagor to give another mortgage—Effect—Guarantee contingent upon an event which does not happen—Effect.*

Plaintiff advanced money to first defendant on the security of a house standing on Government leasehold land, the second defendant being surety for the payment of any deficiency which there might be, if the house when sold did not realise the amount due on the mortgage. The Government terminated the lease and allowed the first defendant compensation and leased her another site. The first defendant built a house on the new site partly with the materials of the house on the former site. This new house was mortgaged to the third defendant. In a suit to enforce the mortgage on the new house it was held—

(1) that the plaintiff had no claim on the new house ;

(2) that his only remedy was to sue the mortgagor personally for the debt as provided by S. 68 of the Transfer of Property Act ;

(3) that the circumstances did not constitute a case of transmutation of the mortgaged property into another form ;

(4) that, if the first defendant had promised to give another mortgage over the new house, the verbal agreement could not prevail against the registered deed to the third defendant ; and

(5) that as regards the second defendant, his guarantee was contingent upon an event, which had not happened and he was not liable. **Palaneappa Chetty v. Ma Shine** 11 Bur. L. R. 159.

FOX, C.J., AND HARTNOLL, J.

(36-a) S. 68—See No. 27, *supra*.

(37) S. 68 (c)—*Right of usufructuary mortgagee to recover mortgage money by sale of mortgaged property.*

Where an usufructuary mortgage deed provided for the recovery of the amount due "from the mortgaged property," the Court granted a decree for sale of the property where the mortgagee, being dispossessed of the mortgaged property, sued for the recovery of the mortgage money. **Narpat v. Ram Saran Das**, 5 A.L.J. 130 = A.W.N. (1908), 70 = 30 A 162.

STANLEY, C.J., AND BURKITT, J.

References :—21 A. 4 ; A.W.N. (1905), 226, R.

Transfer of Property Act—(Continued).

(38) Ss 75, 85 and 96—*Duty of Court when all interested parties are before it—Two successive simple mortgages—Second mortgagee's right to decree for sale subject to first mortgage—Calculation of amount payable for redeeming prior mortgage.*

Where all the interested parties are before the Court, it is the duty of the Court, if it can do so, to make a decree which shall deal finally with the question between them and shall preclude the necessity of further litigation for the enforcement of any right arising out of the mortgage or mortgages in question in the suit.

It is the right of the prior mortgagee to require the second mortgagee to redeem him or submit to a sale of whatever interest he holds in the property (S. 75) ; and the decree must give effect to this right, unless by doing so it unnecessarily deprives the second mortgagee of any right of his own.

S. 96 of the Act does not support the view that the pious mortgagee is not required to redeem the prior mortgagee when the latter is a party to the suit (a).

The amount to be paid for redeeming the prior mortgage must be calculated on the mortgage amount, but not on the money paid by the assignee of the first mortgagee (b) **Cangayam Venkatarama Ayer v. Henry James Colly Gomparty**, 3 M.L.T. 397—18 M.L.J. 298.

WHITE, C.J., AND MILLER, J.

References - (a) 30 C 599, 29 A 385, D (b) 20 M. 120, *Appl.*

(39) S. 76—"Contract to the contrary," interpretation of *Seco* CONSTRUCTION (OF DEEDS). No. 4, 18 M.L.J. 31

(40) S. 78—*Existence of gross negligence—Failure of prior mortgagee to get possession of title-deed—Delay in registration.*

The existence of gross negligence, within the meaning of S. 78 of the Act, must be determined according to the circumstances of each case, and one of the circumstances to be taken into consideration is that, in this country, universal registration exists. Failure on the part of a prior mortgagee to get possession of title-deeds is not, therefore, in the absence of reasonable explanation, necessarily to be imputed to him as gross negligence (a).

Transfer of Property Act—(Continued).

Delay in getting the mortgage registered, which had the effect of enabling the mortgagor to effect a second mortgage, would not make the prior mortgagee's failure to obtain the possession of title-deeds amount in law to gross negligence. **Rangasawmy Naiken v. Annamalai Mudali**, 17 M.L.J. 499 = 3 M.L.T. 87 = 31 M. 7.

WALLIS AND MILLER, JJ.

References:—(a) 2 C.W.N. 750, F.; L.R. 7, H.L. 135; L.R. 26, Ch. D. 482; 9 Hare 449, 18 B. 444, referred to; 12 M. 429, 13 M. 383, 12 M. 424; 15 M. 268; 4 M.H.C.R. 369, D.

(41) S. 78—*Mortgage—Notice—Title-deeds—Whether failure to obtain title-deeds is gross negligence.*

A mere failure to obtain the title-deeds would not amount to gross negligence, within the meaning of S. 78 of the Transfer of Property Act. **Munusawmy Naidu v. Rajagopala Chetty**, 4 M.L.T. 217.

ARNOLD WHITE, C.J., AND SANKARAN NAMB, J.

Reference:—31 M. 7, F.

(42) S. 81—*Decree for sale of the mortgaged property and recovery if necessary from the mortgagor—Construction.*

Where a decree upon a mortgage directed the sale of the mortgaged property, and if necessary from the defendant, held the words "if necessary" in the decree cannot be construed as giving the decree-holder the right of abandoning his claim against the mortgaged property in order to create a necessity to proceed against other property. A necessity contemplated by the decree is a necessity of proceeding against other property, or the mortgagor personally, if the mortgaged property, proves insufficient to realise the amount due. **Manti Kamoji v. Chodimalla Ramamurthy Pantulugaru**, 3 M.L.T. 335.

MILLER AND MUNRO, JJ.

Reference:—29 A. 369, R.

(42-a) S. 81—See No. 23, *supra*.

(43) S. 82—*Marshalling—Contribution—Mortgagor and mortgagees.*

There is nothing in the provisions of the Transfer of Property Act to support the view that, as between a mortgagee and the holders of the equity of redemption, the mortgagee is bound to distribute his debt ratably upon the

Transfer of Property Act—(Continued).

mortgaged properties (a). **Hara Kumari Chowdhurani v. Eastern Mortgage and Agency Co., Ltd.**, 7 C.L.J. 274.

RAMPINI, A.C.J. AND SHAFFUDDIN, J.

References:—29 M. 217; 18 C. 320, F.; 30 C. 755; 1 C.L.J. 337; 3 C.L.J. 571 = 38 C. 613, D.

(44) S. 84—*Tender, requisites of—Mortgagees seeking possession—Redemption.*

In a mortgage deed, after enumerating several contingencies, provision was made on the happening of any of them in the following terms:—

"Notwithstanding anything contained to the contrary, the mortgage-debt, for the time being owing on the security of these presents, shall at once become payable, as if the due date, or extended date, if any, had elapsed, and, in such case, all such right and remedies shall be available to the Banker, as will be available to her under the term of these presents, upon default being made in payment of the principal moneys or interest, and all other moneys hereby secured, and the banker may, in such event in her discretion, without any further consent on the part of the Company, forthwith enter upon or take possession of the mortgaged premises, or any of them of which she is not already in possession."

Owing to the happening of some of the contingencies, the plaintiff claimed that the debt, owing on the security of the mortgage deed, had become payable, and that she was entitled to enter upon and take possession of the premises mortgaged to her. She contended that the expression "as if the due date had elapsed" not only served to accelerate the due date, but also to fix the amount of the mortgage money at what it would have been, if, in fact, the due date had elapsed. The defendant alleged a tender of the mortgage money to plaintiff's attorneys and refusal to accept the same, and claimed to redeem the property.

Held, (1) that the words 'as if due date had elapsed' were used merely to accelerate payment, and they could not be construed to cover the further amount that would have been due on the expiry of the due date of the mortgage.

(2) That the tender was not good, as the plaintiff's attorney disclaimed authority to receive it.

(3) That the defendant was entitled to redeem the property.

Transfer of Property Act—(Continued).

A tender must be made either to the principal whose business it is to consider it or to his authorised agent, and a tender made to a person who disclaims authority to receive it is made at the maker's risk (a). **Bai Ruttonbai v. The Fraser Ice Factory**, 10 Bom. L.R. 203. —32 B. 521.

JENKINS, C.J. AND BATCHELOR, J.

References :—(a) (1843) 1 C. and K. 36; (1833) 1 N. and M. 398, R.

(45) *S. 85—Mortgage—Suit for sale on a mortgage—Parties*,

Whether or not S. 85 of the Transfer of Property Act, 1882, refers solely to persons interested in the equity of redemption, it is not essential to join as a party defendant, in a suit for sale on a mortgage, a person whose interest in the mortgaged property, if it exists, would be antagonistic to the claims of both mortgagor and mortgagee (a). **Khairati v. Banni Begam**, A.W.N. (1908), 100 = 30 A. 240 = 5 A.L.J. 604.

RICHARDS, J.

Reference :—(a) 33 C. 425, R.

(46) *S. 85—Mortgage suit—Parties—Omission to join all the heirs of a purchaser of mortgaged property within time—Effect—Annulment—Notice—Apportionment of debt*.

Where, three days before the period of limitation would expire, a mortgagee instituted a suit on his mortgage, making the original mortgagors and one out of several heirs of a purchaser of the mortgaged properties defendants and the latter in his written statement, filed after the period of limitation had expired, objected that the suit was not maintainable by reason of the other heirs of the purchaser not having been made parties;

Held, that the suit could not be dismissed on the ground of defect of parties unless it was found that the plaintiff was aware, at the date of the suit, of the interest of these persons in the mortgaged property;

Held further, that the proper procedure was to add these heirs as parties, and, if it appeared that at the date of the suit the plaintiff was not aware of their interest in the property, to ascertain what proportion of the debt was due by the heir who had been made a party in time and to pass a decree against his share for that

Transfer of Property Act—(Continued).

amount (a). **Basiruddin Biswas v. Debendro Nath Biswas**, 12 C.W.N. 911.

RAMPINI, C.J., AND RYVES, J.

References :—(a) 18 A. 100; 7 C.W.N. 723 = 30 C. 755, R.

(47) *S. 85—Mortgage cannot release part of mortgaged land and seek to enforce entire claim on other portions—Persons against whom no relief is claimed, suit not liable to be dismissed under S. 85, for non-joining of—Relief afforded to plaintiffs in such cases*.

A mortgagee cannot release a part of the mortgaged land, and then seek to enforce his entire claim upon another portion in which third parties have become interested as assignees of the equity of redemption.

Where no relief is claimed against the persons interested in the portions of the property mortgaged, *held*, that the Court is not bound to dismiss under S. 85 of the Transfer of Property Act, a suit for not joining such persons in the suit (a).

The plaintiffs should, in the suit, as brought, be allowed to recover what is due to them, not exceeding the amount rateably due on the property they proceeded against. **Ponnusami Mudaliar v. Srinivasa Naicken**, 31 M. 333.

BENSON AND MILLER, JJ.

References :—(a) 29 M. 217; 28 A. 174; 15 M. 487; 30 C. 755, R.

(48) *S. 85—Mortgage—Suit for sale on a mortgage—Parties*.

In a suit for sale on a mortgage, the ordinary rule is that a plaintiff mortgagee cannot be allowed so to frame his suit as to draw into controversy the title of a third party, who is in no way connected with the mortgage, and who has set up a title paramount to that of the mortgagor and mortgagee. **Joti Prasad v. Aziz Khan**, A.W.N. (1908), 263.

RICHARDS AND GRIFFIN, JJ.

References :—33 C. 425; 32 C. 746; and A.W.N. (1908), 100, R.

(49) *S. 85—Mortgage of joint family property executed by father alone—Decree for foreclosure—Sons not made parties—Right of sons to redeem*. See **HINDU LAW (ALIENATION)**, No. 16, A.W.N. (1908), 106.

(50) *S. 85—Applicability to the Punjab*. See **MORTGAGE (GENERAL)**, No. 13, 64 P.R. 1908.

Transfer of Property Act—(Continued).

(51) S. 85—Suit by prior mortgagee—*Puisee* mortgagee not made party—Suit for redemption by the latter—Rate of interest. See MORTGAGE (REDEMPTION), No. 22-a, 18 M.L.J. 344.⁶

• (51-a) S. 85—See No. 38, *supra*.

(52) Ss. 86 and 87—*Nature of proceedings under section—Whether suit is to be regarded as pending until decree is made absolute—Appeal.*

Proceedings, under S. 87 of the Transfer of Property Act, are regarded by the Legislature as a continuation of the suit referred to in S. 86 of that Act. Therefore, a mortgage suit must be held to be pending, at any rate, until the decree conditional, referred to in S. 86, has been made absolute, or until the payment made by that decree has been validly made, as the case may be, where the point in issue is, whether an appeal lies from an order made in the course of such proceedings (a).

S. 87 of the Transfer of Property Act does not contemplate the framing of a separate decree in the event of payment being made, as ordered in the decree conditional. **Ganpati v. Daji**, 4 N.L.R. 158.

DRAKE-BROCKMAN, J.C.

References.—(a) 2 N.L.R. 178, F, 1 N.L.R. 143, 3 C.W.N. 756, R, and 3 N.L.R. 55, not F.

(53) S. 87—*Foreclosure decree, sums paid by the mortgagor towards—Order absolute, application for, in lieu of a portion of the decretal amount—Money paid by the mortgagor to discharge a portion of the decree*

Held, that where a mortgagor pays only a certain sum under a foreclosure decree but fails to pay up the whole and an application is made by the mortgagee for an order absolute to foreclose the mortgaged property in lieu of the unpaid portion, the mortgagor cannot ask the Court that the sums paid by him under the decree should be returned to him before the decree is made absolute. **Syed Fida Hussain and another v. Lala Chhanga Mal**, 10 O.C. 354.

CHAMBER AND SANDERS, J.CS.

(53-a) S. 87—See No. 52, *supra*.

• (53-b) S. 88—See No. 23, *supra*.

(54) Ss. 88 and 89—*Civil Procedure Code, S. 258—Execution of decree—Alleged payment out of Court not certified.*

Transfer of Property Act—(Continued).

Applications for an order absolute for sale under section 89 of the Transfer of Property Act, 1882, are applications for the execution of the three under section 88 of the Act (a). To such applications section 258 of the Code of Civil Procedure is applicable, and bars the recognition of payments made out of Court in pursuance of the decree unless such payments are certified to the Court in the manner prescribed by the section. **Hakim Singh v. Ram Singh**, A.W.N. (1908), 103=5 A.L.J. 272=30 A. 248.

AIKMAN AND KARAMAT HUSAIN, JJ.

References.—(a) 18 A. 278; 25 M. 244, R. (b) 28 M. 473, F, 24 M. 412, 8 C.W.N. 102, Diss.

(55) Ss. 88, 89 and 93—*Usufructuary mortgage—Decree for sale in default of payment on fixed date—Payment after such date—Delivery of possession made to mortgagor—Mortgagee not applying for sale when owed—Mortgagee subsequent to ouster contesting delivery of possession to mortgagors—Proceedings subsequent to decree for sale, nature of—Ss. 2, 244 and 310-A, C.P.C.—Effect of default on position of mortgagor after decree for sale—Rate of interest.*

On a decree directing sale, in default of payment, of property usufructuarly mortgaged, the mortgagor paid the money, some months after the fixed date, into Court with an application in the form of an application for execution of a decree, and obtained delivery of possession of the mortgaged property. Till then the mortgage remained in possession, but had not, when he was ousted, applied for an order for sale under S. 89, Transfer of Property Act. He refused to receive the money and contended that the Court had no power, in execution proceedings, to permit the mortgagors to pay it into Court and to direct delivery of possession to them, they not having paid on the fixed date.

Held, that a decree for sale, under S. 88 of the Transfer of Property Act, is a final decree, and, all subsequent proceedings are proceedings in execution of that decree, and to them the provisions of the Civ. Pro. Code are, so far as they may be applicable, to be applied (a) Unless, then, there is something in the decree to debar him from so doing, the judgment-debtor is entitled to stop execution by payment of the debt, at any time after the decree has been passed, and before the execution-sale is complete and it is not finally complete until he has

Transfer of Property Act—(Continued).

had his opportunity of obtaining its rescission under S. 810-A of the Code.

The decree for sale does not debar the mortgagor of any right in default of payment; the only penalty affixed to the default is the liability to have the property sold (b).

Though the mortgagors be regarded as decree-holders, within the meaning of S. 2, C.P. C. (c), by their default, they only lose the privileges of a decree-holder, which their creditor has thrust upon them, but they do not thereby lose their rights as judgment-debtors to pay the debt into the Execution-Court and require satisfaction to be entered up. A mortgagor can obtain possession of his property in execution-proceedings after paying money into the Court executing the decree.

Regarding the rate of interest to be awarded to the mortgagee after the decree directing the sale, he was held entitled only to the usual Court rate of interest, *i.e.* 6 per cent., and not to the *melwarām* of the property according to the terms of the mortgage. **Audipurānam Pillay v. Gopālasawmy Mudali**, 3 M.L.T. 281 = 18 M.L.J. 259 = 31 M. 354.

MILLER AND MUNRO, JJ.

References.—(a) 25 M. 244, *It.* (b) 31 C. 863, *It.* (c) 19 M. 40, *D*; 24 M. 244 (282); 25 M. 300, *It.*

(56) S. 89—Application for order absolute not in accordance with the Civil Rules of Practice. See LIMITATION ACT, No. 135, 17 M.L.J. 596 = 3 M.L.T. 254.

(57) S. 89—Order refusing application for order absolute under section—Appeal—*Ad valorem* Court-fee on value of appeal should be paid on memorandum of appeal. See COURT-FEE, No. 3, 12 C.W.N. 1028.

(57-a) S. 89—See Nos. 54 and 55, *supra*.

(58) Ss. 89 and 104—Mortgage decree—Execution—Adjustment—Power of executing Court to enforce—Civ. Pro. Code, Ss. 244 and 258.

After the order absolute for sale was passed, the mortgagee agreed, upon receipt of certain sums of money, to give up his claim for compound interest and to allow a certain remission.

Held, that the Court executing the decree was competent to give effect to the adjustment (a)

Transfer of Property Act—(Continued).

Quære—Whether S. 258 of the Civ. Pro. Code applies to proceedings in execution of a mortgage decree (b). **Harish Chandra Mondol v. Jagabandhu Dutta**, 12 C.W.N. 282 = 3 M. L.T. 202 = 7 C.L.J. 581.

STEPHEN AND MOOKERJEE, JJ.

References.—(a) 8 C.W.N. 684 = 31 C. 863, *Appl.* (b) 4 C.W.N. 474; 8 C.W.N. 102, *R.*

(59) S. 90—Application for a personal decree against mortgagor—Limitation—Act No. XV of 1877 (Indian Limitation Act), Sch. II, Art. 116.

Held that the fact that there is no express personal covenant to pay the mortgage money is no bar to the mortgagee obtaining a personal decree under section 90 of the Transfer of Property Act, 1882, against the mortgagor if the requirements of the section are otherwise fulfilled. A personal covenant to pay is implied in and is an essential part of every simple mortgage (a).

Held also that on an application under section 90 of the Transfer of Property Act it is the date of filing the suit which has to be looked to in considering the question whether the balance is legally recoverable from the defendant. **Jangi Singh v. Chander Mol**, A.W.N. (1908), 161 = 30 A. 388 = 5 A.L.J. 670.

AIKMAN AND GRIFFIN, JJ.

References.—(a) 11 Bom. 475, *Not F*; 21 M. 242, *R.* (b) 20 A. 386, *F.*

(60) S. 90—Mortgage decree—Order for sale—Costs—Costs of can be recovered from the mortgagor personally.

The costs awarded by a decree directing the sale of mortgaged property from part of the mortgage decree and the decree-holder must proceed to recover the costs by a sale of the mortgaged property in the first instance, and it is only when the mortgaged property is found to be insufficient (a) to satisfy the decree that the decree-holder can proceed against the other properties of the mortgagor in the manner provided by S. 90 of the Transfer of Property Act. **Raj Kumar Singh v. Sheo Narain Singh**, 12 C.W.N. 364 = 35 C. 431 = 9 C.L.J. 152.

GEIDT AND CHITTY, JJ.

References.—(a) 14 C. 185; 10 A. 179, *D*; 20 A. 523, *followed*.

(61) S. 90—Ex parte decree under section—Inherent power of Court to set it aside—

Transfer of Property Act—(Continued).

Personal decree for large sum should not be ex parte decree—When such decree can be passed—S. 4, Succession Certificate Act.

A decree under S. 90 of the Transfer of Property Act was passed *ex parte* in a suit to enforce a mortgage. *Held* that there was inherent jurisdiction in the Court to set it aside (a), and that if the decree be a personal decree for a large sum, it ought not to have been made *ex parte*, as the person against whom it was passed had a right to be heard as to his personal liability for this sum, and whether his property was liable for the debt claimed, and whether the amount was correct.

A decree can only be passed under S. 90 against a defendant, from whom the balance is legally recoverable. Having regard to S. 4 of the Succession Certificate Act, the Court cannot pass any decree under S. 90, Transfer of Property Act, in favour of the representative of the mortgagee, where no certificate had been granted to him under any of the Acts mentioned in that section, and a certificate which is granted after the passing of the decree under S. 90 is not sufficient to get rid of the difficulty in his path created by the clear language of S. 4 of the Succession Certificate Act. **Abdul Sattar v. Satya Bhushan Das**, 35 C. 767.

MACLEAN, C.J., AND COKE, J.

Reference :—(a) 92 C. 253 (F.B.), F.

(61-a) S. 90—Mortgage—Construction—Unconditional promise to pay, if implies personal liability.

If a person promises to pay a certain sum of money with interest, and hypothecates certain property as security, without any express covenant that he would be personally liable, or without stating any mode of payment, he is personally liable, and a decree under S. 90 of the Transfer of Property Act should be passed in such a case against the mortgagor, if the sale-proceeds of the mortgaged property do not satisfy the entire debt and the right to have such a decree is not time-barred (a). **Ram Kishore Gir v. Surajdeo Pershad Singh**, 13 C.W.N. 138.

MITRA AND BELL, JJ.

References :—(a) 4 C.L.J. 246, *Appr.*; 10 C. 740; and 16 C. 540, R.

(62) S. 90—Application by heir of mortgagees for supplementary decree—succession certificate if necessary. See ACT VII of 1889 (SUCCESSION CERTIFICATE), No. 4, 12 C.W.N. 145.

Transfer of Property Act—(Continued).

(62-a) Ss. 90, 97—S. 90, costs recoverable under—Mortgagee holding a single decree on two mortgages—Appropriation of sums recovered in execution—Transfer of Property Act, Ss. 96 and 97.

Held, that costs decreed are recoverable under S. 90 of Act IV of 1882 (a).

Held further, that S. 97 of Act IV of 1882 applies directly only to proceedings under S. 96 of the said Act.

Held also, that, where a mortgagee holds a single decree on two mortgages, he cannot be precluded, whether by the alleged analogy of S. 97 or otherwise, from appropriating sums recovered by him in execution towards the satisfaction of whichever mortgage he finds most convenient. **Jwala Sahay v. Dhanay**, 11 O.C. 377.

PIGGOTT, J.C.

References :—(a) 30 M. 464; 14 C. 185; 20 A. 523, R.

(63) S. 91—Mortgage—Fixed rate tenant—Sunt by zemindar to redeem, a mortgage made by a fixed rate tenant on the death of the tenant without heirs.

Held that the zemindar is not, within the meaning of section 91 of the Transfer of Property Act, 1882, a person having an interest in the mortgaged property so as to entitle him to redeem a mortgage of his holding made by a tenant at fixed rates, who has died without heirs. **Ram Dihal Rai v. The Maharaja of Vizianagram**, A.W.N. (1906), 210=5 A.L.J. 578.

RICHARDS AND KARAMAT HUSAIN, JJ.

Reference :—3 I.A. 92, R.

(64) S. 91—Redemption of mortgage—Reversionary heirs of deceased husband of Hindu widow not entitled to redeem mortgage made by husband.

Held, that the reversionary heirs of the deceased husband of a Hindu widow, in possession as such of her husband's property, are not persons who, within the meaning of section 91 of the Transfer of Property Act, 1882, have such an interest in the mortgaged property, as would entitle them during the life-time of the widow to redeem a mortgage made by the husband. **Ram Chander v. Kallu**, A.W.N. (1908), 225=5 A.L.J. 631.

STANLEY, C.J., AND BANERJI, J.

Transfer of Property Act—(Continued).

(65) Ss. 92 and 94—Decree in redemption suit—Nature and effect. *See RES JUDICATA, No. 4, 4 A.L.J. 763=30 A. 36.

(66) S. 93—Redemption and sale, suit for, by subsequent mortgagee—Purchaser in execution of prior mortgage decree in possession, position of—Redemption money, deposit of, after date fixed but before order absolute—Deposit accepted by Court—No formal order extending time.

Defendant purchased a certain property in execution of decree on a suit by a first mortgagee in which the plaintiff a third mortgagee was no party. He (the defendant) redeemed the second mortgagee and was in possession of the property. The plaintiff sued to enforce his mortgage as also to redeem prior incumbrances

Held, that S. 93 of the Transfer of Property Act did not, in its literal terms, apply to a case where there was no prior mortgagee still in existence, but the principles there laid down ought to be followed in dealing with such a case.

The plaintiff who did not deposit the redemption money within the time allowed by Court can redeem afterwards before a final order is made under cl. (2) of S. 93 of the Transfer of Property Act, that is, before the decree is made absolute (a).

The position of the defendant, who is in possession of the property under an obligation to re-transfer it, if the redemption money is paid on a fixed date, is analogous to that of a mortgagee by conditional sale.

If a deposit of the redemption money is accepted by the Court before the final order under cl. 2 of S. 93 of the Transfer of Property Act, but after the date fixed for payment, it becomes an effectual deposit, although no formal order extending the time was passed. **Bepin Behary Shaha v. Mukunda Lal Ghosh**, 8 C.L.J. 547.

CASPERSZ AND COXE, JJ.

References:—(a) 25 M. 300 (306-7), F.; 22 B. 771; 16 C. 246; 24 A. 479, R.

(67) S. 93—Execution of decree—Decree nisi—Decree absolute—Civ. Pro. Code, 1882, S. 244. See EXECUTION OF DECREE, No. 24, 10 Bom. L.R. 1057.

(67-a) S. 93—See No. 55, *supra*.

(67-b) S. 94—See No. 65, *supra*.

(67-c) S. 96—See No. 38, *supra*.

(67-d) S. 97—See No. 62-a, *supra*.

Transfer of Property Act—(Continued).

(68) S. 99—Div. Pro. Code, S. 311—Mortgage—Simple money decree accepted by mortgagee—Sale of mortgaged property in execution of such decree.

Even though the mortgagee obtains all interest in his mortgage and asks for and obtains a simple money-decree, he is precluded, by S. 99 of the Transfer of Property Act, 1882, from bringing the mortgaged property to sale in execution of the simple money-decree (a). But if such a sale does in fact take place and is confirmed and a certificate is granted to the auction-purchaser, the sale cannot afterwards be impeached, upon the ground that it was in violation of S. 99 of the Transfer of Property Act (b).

Any irregularity in publishing a sale is a matter to be dealt with under S. 311, Civ. Pro. Code. **Kishan Lal v. Umrao Singh**, A.W.N. (1908), 49=5 A.L.J. 121=30 A. 146.

AIKMAN AND KARAMAT HUSAIN, JJ.

References —(a) A.W.N. (1905), 152, F. (b) A.W.N. (1908), 48, 12 C.W.N. 14; 10 M.L.J. 110, 26 C. 727, and 29 A. 612, R.; 33 C. 293, D.

(69) S. 99—Mortgage—Sale of mortgaged property in execution of a decree for costs—Sale confirmed—Subsequent suit for redemption.

Part of property, the subject of a mortgage, was sold in execution of a decree for costs, otherwise than in accordance with the provisions of section 99 of the Transfer of Property Act, 1882, and was purchased by the assignees of the mortgagee decree-holder, and this sale was confirmed. *Held*, that the mortgagor could not obtain redemption of the portion of the property so sold (a), although—the integrity of the mortgage having been broken up—it was possible for him to obtain a decree for redemption of the unsold portion. **Madan Makund Lal v. Jamna Kaulapuri**, A.W.N. (1908), 48.

KERSHAW, C.J., AND BANERJI, J.

Reference:—(a) 18 A. 325, *applied*.

(70) S. 99—Assignee of a money decree obtained by the mortgagee, right of, to sell in contravention of S. 99 of the Transfer of Property Act—*Hastings*—Civil Procedure Code, S. 232.

Held, that S. 99 of the Transfer of Property Act applies as much to the transferee of a money decree obtained by the mortgagee as to

Transfer of Property Act—(Continued).

the mortgagee himself. **Sripal Singh v. Gouri Shankar**, 11 O.C. 231 (B).

CHAMBERLAIN, J.C., AND GREVEN, A.J.C.

References:—**11 B. 462** and **31 M. 33, F. 27 A. 460** and **7 Bom. L.R. 816, distgd.**

(70-a) **S. 99**—See Nos. 34 and 35, *supra*.

(71) **Ss. 99, 67 and 100—Mortgages—Attachment by mortgagee—Application—Suit**

S. 99 of the Transfer of Property Act contemplates attachment by the judgment-creditor (even if he be a mortgagee) and he is entitled to do so by an application in execution of the decree. **Nathubhai Motilal v. Bai Ujjam**, 10 Bom. L.R. 274 = **32 B. 205**.

JENKINS, C.J., AND BATCHELOR, J.

(72) **S. 100**—Document showing intention to make land security for payment of money mentioned in it creates charge. See **CONSTRUCTION (OF DECREES)**, No. 2, 10 Bom. L.R. 575.

(72-a) **S. 100**—See Nos. 26, 32 and 71, *supra*.

(72-b) **S. 104**—See No. 58, *supra*.

(73) **Ss. 107 and 130—Lien—Charge—Assignment**. See **LEASE**, No. 4, 10 Bom. L.R. 1146.

(74) **S. 108**—Notice to quit, addressed to tenant as trespasser, if legal. See **EJECTMENT**, No. 1, 7 C.L.J. 107.

(74-a) **S. 108**—Accession to leased land by alluvion—Right of lessee. See **LEASE**, No. 5, 2 Sind L.R. 1.

(75) *Notice—S. 108 (j)—Limitation Act (XV of 1877), Sch. II, Arts. 110 and 116—Royalty, suit for.*

Where it was stipulated that a certain notice was to be given two months before the 30th of Chaitra.

Held, that a notice dated 1st Falgun (= 13th February) was not a valid notice when the 30th Chaitra fell off 12th April as it was not a full 'two months' notice but fell short of it by one day.

In view of the provisions of Cl. (j) of **S. 108** of the Transfer of Property Act, all lessees including lessees holding under permanent leases are liable for rent even after they have transferred their rights.

A suit for recovery of royalty upon a registered document is governed by art 116 and not art 110 of Sch. II of the Limitation Act (a).

Transfer of Property Act—(Continued).

Bhola Nath Das v. Raja Durga Prosad Singh, 12 C.W.N. 724.

RAMPINI AND SHARFUDDIN, JJ.

Reference:—(a) **19 C. 483, F.**

(76) **S. 111—Lease for a term—Lessee's failure to renew lease at end of term—No forfeiture—Lessee's liability to pay rent—Determination of lease by lessor a condition precedent.**

The failure by tenant to renew a lease for a term in compliance with the provision for renewal contained therein does not operate as a forfeiture, determining the tenancy *ipso facto* and relieving the tenant from liability to pay rent under the lease. A lease becomes determined by forfeiture only when the lessor does some act showing his intention to determine the lease.

Bourammiah v. Mallammal, 4 M.L.T. 315.

ARNOLD WHITE, C.J., AND SANKARAN NAR, J.

(77) **S. 111—Forfeiture—Denial of landlord's title—Pleading**

Where, after the denial of a landlord's title, he received rent from the tenant, he cannot rely upon the denial as a ground of forfeiture.

Semle—**S. 111** of the Transfer of Property Act deals with the whole lease of the immovable property comprised therein and not with a part or moiety of it, a denial of title by one of several joint lessees cannot therefore entail forfeiture.

Held—That a suit for *khas* possession for denial of landlord's title by one of two joint tenants is not maintainable when the other tenant has not been made a party.

When the tenants did not repudiate their lease but rather stuck to it, and only questioned the right of the plaintiffs as transferees from their lessor, the alleged transfer appearing to be of a prior date to the lease.

Held—That there was no denial of landlord's title to cause a forfeiture of the tenancy.

Where the tenants could not obtain possession of the whole area leased to them, and on reference to their lessors got no satisfaction from them, and then took a lease of the portion of which they could not get possession, from a stranger whom they found in possession.

Held—That there was no renunciation by the tenants of their character as such so as to entail forfeiture. **Srimati Farman Bibi v. Sheikh Tash Haddad Hasain**, 12 C.W.N. 587 = 7 C.L.J. 648.

MACLEAN, C.J., AND COXE, J.

Transfer of Property Act—(Continued).

(78) S. 111—Joint lessors, putting an end to tenancy—Intention to determine lease—Ejectment. See LANDLORD AND TENANT, No. 11, 7 C.L.J. 483.

(79) S. 116—Consent, effect of, of lessor on position of tenant holding over and on that of tenant's representatives—Death of tenant by sufferance—Position of representatives.

S. 116 of the Transfer of Property Act which enables the lessor or his representative by his assent to convert a tenant by sufferance into a yearly or monthly (a) tenant does not enable him by his mere assent, to convert the representative of a tenant by sufferance into such a tenant without the latter's own consent.

If a tenant by sufferance dies and his representative holds on, he holds as trespasser (b). **Yadappalle Narasimham v. Dronamraju Seetharamamurthy**, 18 M.L.J. 26 = 3 M.L.T. 256 = 31 M. 163.

WHITE, C.J., AND WALLIS, J.

References:—(a) T.R. 159; 1 Q.B.D. 736, R. (b) 8 M. 424 (427), 3 Bom. H.C.R. A.C.J. 27, R. 18 B. 256, D. and dissented from in 22 B. 893, and 24 B. 504, R.

(80) Ss. 122 and 123—Gift of immovable property—Deed registered after the donor's death—Practice—Remand—Taking of evidence by the District Court permissible.

A gift of immovable property duly made by means of a registered deed is not invalid merely because registration of the deed of gift may have taken place after the death of the donor (a).

It is the invariable practice of the Courts in the mofussil that, when a remand, involving the taking of fresh evidence, is ordered, the District Court sends down the case to the first Court in order that the evidence may be taken there, and this is done in the interests of the parties themselves and for their convenience. But nevertheless the District Court still remains empowered by the order of remand to take what evidence it may see fit to take, and record its findings upon it. **Khushaba Mansing v. Chandrabhagabai**, 10 Bom. L.R. 596 = 32 B. 441.

DATCHWILOR AND BEAMAN, JJ.

Reference:—(a) 20 A. 392, F.

(81) S. 123—Gift—Unregistered instrument—Donor's tenant for term attorning to

Transfer of Property Act—(Concluded).

donee—Limitation Act, S. 144—Donee's possession when adverse—Change in pleading

Where a *stridhanam* grant is effected, not by means of a registered instrument as required by S. 123 of the Transfer of Property Act, but by a written direction given by the donor to his tenant for term, requiring him to pay the rent to the donee, such grant is invalid.

A defendant, alleging in her written statement that a certain gift was made to her as *stridhanam*, should not afterwards be allowed to change her case, and to allege that the gift was for maintenance.

Where a tenant for a term attorns to a person having no right to the property leased and pays rent to him, this circumstance does not make the possession of the other person, during the term of the lease, adverse to the lessor or to any person claiming under him (a).

Verus.—Where the tenant determines the tenancy by surrendering his rights under the lease. **Acharath Bappan v. Mathummal Choyi**, 4 M.L.T. 327.

MUNRO AND PINHEY, JJ

References:—(a) 21 M. 153 (163 and 164), F.

(81-a) S. 123—See No. 80, *supra*.

(81-b) S. 129—See No. 19, *supra*.

(81-c) S. 130—See No. 73, *supra*.

(82)—whether applies to tenancy created before the Act came into force—Non-permanent tenure created before the passing of the Act, whether transferable. See EJECTMENT, No. 2, 7 C.L.J. 553.

(83) Applicability of, to Burma. See MORTGAGE (REDEMPTION), No. 6, U. B. R. (1907), Third Quarter, Mortgage, 1.

(84)—whether gives authority to landlord to enhance the rent of his tenant during term of lease. See COMPENSATION, No. 1, 7 C.L.J. 284.

Treasure Trove Act.

See ACT VI OF 1878.

Trees.

(1)—, grant of, apart from the land—Grantor reserving every forest right but the one granted—Grant of forest right within the meaning of S. 193 of Bengal Tenancy Act—Growing—Immovable property—Transfer of moveables. See ACT VIII OF 1885 (BENGAL), No. 24, 7 C.L.J. 152.

Trespass—(Concluded).

(2) Right to cut fruit bearing trees. See **LANDLORD AND TENANT**, No. 23, 4 M.L.T. 187.

(3) Limitation for removal of—See **LIMITATION ACT**, No. 50-a, 11 O.C. 379.

Trespass.

(1)—*Civil not criminal*—**Indian Penal Code**, S. 448—*Crim. Pro. Code*, S. 522, *applicability of*.

When, during the absence of the complainant, the accused took possession of the house in her occupation and established there a boy alleged to be the adopted son of the complainant's father,

held—that the accused could not be convicted of an offence under S. 448, I.P.C., as the house-trespass which they committed was not a criminal, but a civil trespass,

held, also, that no order could be passed by the trying Magistrate under S. 522 Crim. Pro. Code, for the delivery of possession of the house to the complainant, as the accused had not been convicted by the Magistrate of any offence attended by criminal force, and that the house should be restored to the accused, who were found in possession of it. **Scita Biswal v. Dochhi Stri**, 12 C.W.N. 269.

RAMPINI AND SHARFUDDIN, JJ.

(1-a) *Trespass, what constitutes—whether damage necessary—Exemplary damages, whether can be given.*

Trespass is the infringement of a right, and gives a cause of action even when no damage results, and not only substantial, but exemplary, damages may be given if the circumstances require. **Nga Tun Nyo v. Nga Tha Hmat**, U.B.R. (1907), Third Quarter, Fort, i.

SHAW, J.C.

References—U.B.R. (1904—06) II, Tort, p. 9. K.

(1-b) *Trespass—Acts done under orders of lawful superior, responsibility for—House search—Trespass ab initio—Trespass on person—Master and servant—Loss of service.*

A person cannot be held responsible for acts done by him under the orders and directions of his lawful superior.

If a police-officer, whilst lawfully conducting a search, assaults some person on the premises, his entry on the premises does not necessarily become unlawful from the outset (a)

Trespass—(Concluded).

In all cases of action for trespass to the person of the servant, it is necessary for the master to prove that he has, to some extent at least, been deprived of the services of his servant, owing to the wrongful act of the alleged trespasser. **Brojendra Kissore Ray Chaudhuri v. M. A. Luffeman**, 12 C.W.N. 982.

FLETCHER, J.

References—(a) 7 Ad. and El. 167, *per* Littledale, J App. 176, F. 8 Co. Rep. 146 (a). s.c. 1 Sm. L.C. (11th Ed.), p. 122, D.

(2)—by Shebait—Liability of idol for mesne profits. See **RELIGIOUS ENDOWMENTS**, No. 1, 12 C.W.N. 550.

(3)—committed by subordinate official under superior official's order—Liability. See **COURT OF WARDS**, No. 1, 12 C.W.N. 1065.

Trustee.

(1) Suit by—Co-trustee made defendant without showing that he refused to be joined as plaintiff. See **CIV. PRO. CODE**, No. 50, 4 M.L.T. 194

(2) Trustee abandoning decree—Beneficiaries joined as co-plaintiffs on appeal—Power of trustee to change usages of trust. See **HINDU TEMPLE**, No. 1, 12 C.W.N. 946.

(3) Power of Court regarding trustees under S. 14 of Religious Endowments Act—Proceedings for appointing new trustees—S. 539, C.P.C. See **ACT XX OF 1863 (RELIGIOUS ENDOWMENTS)**, No. 2, 5 A.L.J. 191.

Trusts.

(1) *Registered deed selling certain property for charitable purposes and providing for appointment of successor—Whether revocable.*

If an instrument is a deed in form, in order to hold it testamentary, or in the nature of a will, there must be something very special in the case, and unless there are circumstances which compel the Court to treat an instrument in the form of a deed, as a will, the Court will not do so (a).

Where by a registered deed a person settles certain immoveable property on certain charitable trusts, and appoints himself as hukda for life, and provided that after his death, his grandson should succeed him as hukda, and that such grandson and every successive hukda should in turn select a successor in like manner *held*, that though the provisions as to the succession after the death of the settler

Trusts—(Continued).

immediate successor may be open to objection, that cannot affect the provisions as to the succession of the settler's immediate successor, that the right to the trusteeship which became vested in him at the date of the deed took effect in possession at the death of the settler, and that the appointment made by the settler in the deed of trust cannot be cancelled by a subsequent deed. **Mahadeva Iyer v. Sankarasubramania Iyer**, 4 M.L.T. 103=18 M.L.J. 450.

WALLIS AND BENSON, JJ.

Reference —2 Dr. and Sin p. 589, F.

(2) *Muktad trusts are valid trusts—Zoroastrian faith, tenets of—Scheme of the belief of the Zoroastrian faith explained—*

Trusts and bequests of lands or money—for the purpose of devoting the income thereof in perpetuity for the performance of Muktad Baj, Yejushni and other like ceremonies, are valid "charitable" bequests, and, as such, exempt from the application of the rule of law forbidding perpetuities.

The performance of the Muktad ceremonies is a religious duty imposed upon the Zoroastrians by the proved tenets of the religion they profess. The ceremonies themselves are acts of religious worship. They include worship, praise and adoration of the supreme Deity, and a thanks-giving for all His mercies. They contain petitions for benefits both temporal and spiritual for all Zoroastrians—for all holy and virtuous men of all other communities—and they comprise prayers for the well-being and long reign of the Sovereign, for good Government by him, and for victory to him over all his enemies. The Muktad ceremonies tend most unmistakably towards the advancement of the religion promulgated by the Persian Prophet Zoroaster, and the performance of these ceremonies is an act of Divine worship in its highest and truest sense.

The moneys paid to the priests for the performance of the Muktad ceremonies forms a good portion of their ordinary income. The priests make a higher income during the Farvardigan days than they do during any other period of the year, and the Muktad ceremonies form a sort of endowment which goes a long way to maintain the priestly classes whose existence is necessary to the community of Zoroastrians. According to the belief prevailing amongst the faithful followers of the Prophet

Trusts—(Continued).

Zoroaster, the performance of the Muktad ceremonies confers public benefits—benefits on the Zoroaster community, on the peoples amongst whom they live, and upon the country which they have chosen as their home. The fundamental principle underlying this belief is faith in the efficacy of prayers addressed to the Great Creator. **Jamshed K. Tarochand v. Soonabai**, 10 Bom. L.R. 417.

DAVAR, J.

(3) *Suit to appoint a trustee and recover trust properties—Joinder of parties—Stranger to trust, whether can be joined as party—Widow and heir of trustee—Civ. Pro. Code, Ss 28, 43, 45 and 539.*

The trustees of a religious endowment lent on a pro-note a certain sum of money belonging to the trust funds to a stranger. The pro-note and the balance of the trust funds remained with one of the trustees. On the death of that trustee, his widow took possession of the pro-note and funds. The remaining trustees alleged that the money was advanced in equal shares by them and the deceased trustee, and not out of the trust funds.

The plaintiff who was appointed a fresh trustee sued the remaining trustees and the widow for the appointment of a trustee for the trust funds, for a declaration that the pro-note and the funds in the hands of the widow were part of the trust property, for the vesting in such trustee of the property belonging to the trust, and for directing the widow to hand over to the trustee the papers and the funds in her possession belonging to the trust. **Held**, (1) that the joining of the widow with the trustees did not constitute a mis-joinder, and, (2) that the suit fell within S. 539 of the Civ. Pro. Code. **Maung Cho and others v. Ma Chaw**, 4 L.B.R. 183

HARTNOLL, J

References.—5 A. 163; 23 C. 821; 16 A. 279; 26 B. 259, 33 C. 789, L. 2 C.L.J. 431, F.

(4) *Dedication of village to the temple proved—Diversion of trust property—Representation by the manager in his private capacity—No estoppel.*

Where the dedication of the income of a village to a temple is fully proved, the diversion of the trust funds, if any, must be treated as an unauthorised use of the trust funds and not as evidence of there being no real dedication. And

Trusts—(Continued).

when the village was dedicated to the religious services of the idol, it constituted "in legal contemplation, its property," though the idol can enforce its rights only through a manager. The idol, or deity, for this purpose, must, therefore, be treated in law as a "person," who can be bound only by any statement of its manager or agent acting on its behalf, within the scope of his authority. And when he made a statement admittedly not acting on behalf of the temple, but avowedly on his own account, any statement made by him in that capacity cannot bind the idol or the deity of its representative.

Granthi Subbiah Chetty v. Sreeman Maha Mandaleswara Katari Salwa Maharaja Umade Maharaja Raja Bommaraju Bahadur Deva Maharajulam Garu, 4 M.L.T. 417.

SANKARAN NAIR AND ABDUR RAHIM, JJ.

Reference.—13 M.L.A. 270, F.

(5) *Beneficiary's right to sue trustee for account—Discretion to trustee—Distinction between trust, condition and fiduciary power.*

A will ran.—"I bequeath Rs. 5,000 for the marriage expenses of my daughter S. to be paid when that event happens." *Held* that the case was one of trust and that the subject-matter of the trust was not the power only to spend out of the fund, but the fund itself. No discretion is given to the trustees under the will to spend what was necessary or legitimate, but they are directed to pay the whole amount. So, if the ceremonial expenses did not exhaust the fund, the trustees were under an obligation to present the balance to S, the beneficiary. S had therefore a right to sue for an account and for the balance.

Distinction between trust, condition and fiduciary power explained. **Ghandumal Ram-rakhiomal v. Sitabal**, 1 S.L.R. 263.

PRATT, J.C., AND HAYWARD, A.J.C.

Reference.—26 M. 497, R.

(6)—for charitable purposes—not void for vagueness—Parties—Persons interested not being upon the record—Effect. See **ENDOWMENT**, No. 1, 5 A.L.J. 23.

(7) *Suit to enforce—under S. 539, Civ. Pro. Code—Conditions to bring suit within purview of section to be filed by Advocate-General or by two or more persons interested in—with previous sanction of Advocate-General.* See **CIV. PRO. CODE**, No. 289, 10 Bom. L.R. 87.

Trusts—(Concluded).

(8) "Trust for specific purpose" is merely a more expanded mode of expressing the same idea as that conveyed by the expression 'express trust' of English Law—Used in S. 10, Limitation Act, in contradistinction to trusts arising by implication of law, trusts resulting and constructive. See **LIMITATION ACT**, No. 13, 10 Bom. L.R. 540.

(9) *Gift—Imperfect gift—Court's power to construe it as a trust—Creation of trust—Donor's intention and acts.* See **GIFT**, No. 1-a, 10 Bom. L.R. 1209.

Unclaimed property.

(1) *Unclaimed article found not hidden on land—Respecture rights of land-owner and finder of article—Ownership of unclaimed hidden treasure—Act VI of 1878 (Treasure Trove).*

The law with reference to the ownership of unclaimed hidden treasures is regulated by the provisions of the Indian Treasure Trove Act. VI of 1878. A brief review of the law of hidden unclaimed treasures and its history traced (a).

Where an unclaimed article was found, not hidden, on the land of a certain person, *held* that they are the property of the person on whose land they were found, unless they were found in some public place, and that the land-owner is entitled to recover it (b). **Virupaksha Swami Temple, by its Manager, Sitarama Sastrulu v. Lambani Golaya**, 4 M.L.T. 219.

WALLIS AND MUNRO, JJ.

References—(a) 1 Moore, (P.C.), 176, R. (b) 2 Q.B. 44 (1896), and 7 M.H.C. 150, *considered*.

Unconscionable bargain.

See **CONTRACT ACT**, No. 6, 115 P.R. 1908.

Under-proprietor.

Estate of—devolving upon his widow after death—During widow's possession Government enlarging estate—Effect of Government's action will not make widow Zemindar with title, independent of what she derived from her husband. See **HINDU LAW (WIDOW)**, No. 13, A.W.N. (1908), 222.

Undue influence.

(1) *Undue influence—The Indian Contract Act, Amendment Act (VI of 1899), S. 2—Presumption—Landlord and tenant—Dominating the will—Kabuliyat unfairly obtained, onus—Executors—Suit to set*

Undue influence—(Concluded).

aside by one of the executants—Fraud—Pleadings—Full particulars.

There is no broad or general presumption that a landlord, even an influential one, can so dominate the will of his tenants as to induce them to make unconscionable bargain in his favour.

The onus of proving that a kabuliyat was unfairly obtained lies on the person who alleges it.

Where a kabuliyat was executed by several persons, it cannot be set aside as a whole, when all the executants did not question it.

Per Ryves, J.—It is incumbent on a party, be he plaintiff or defendant, who seeks to avoid a contract on the ground of fraud or undue influence, to give in his pleadings full particulars of the circumstances on which he relies as the basis of his plea. It is not enough to boldly assert that, fraud or the like vitiated the contract. (a). **Raja Fromada Nath Roy Bahadur v. Kinoo Mollah alias Kala Mia**, 8 C.L.J. 315.

RAMPINI, A.C.J., AND RYVES, J.

Reference —(a) 15 C. 533 (P.C.), B.

(2) What constitutes—Loan borrowed by person in urgent need—Promise to pay time-barred debt with interest—Validity. See CONTRACT ACT (IX OF 1872), No. 8 9 Bom. L.R. 1164 = 32 B. 37.

(3) Suit upon deed—Defence of want of genuineness of deed—Issue upon that basis—Plea of misrepresentation, undue influence or fraud not allowed subsequently. See PLEADINGS, No. 1, 10 Bom. L.R. 494.

(4) Relations between parties anterior to transaction under dispute, which placed one party in subordinate position, essential to make out—. See CONTRACT ACT, No. 5, 11 O.C. 295.

Unprofessional conduct.

—of Attorney—Attorney appealing for both sides See ATTORNEY, No. 1, 8 C.L.J. 165.

Usury Laws Repeal Act.

See ACT XXVIII OF 1855.

Vakil.

(1) *Right of audience—Insolvency appeals in the High Court—Procedure of Insolvency Commissioner—Omission to consider important documentary evidence.*

Vakil—(Concluded).

A Vakil of the High Court has the right of audience before the High Court in an appeal from the Insolvency Court, although he has no such right before the Commissioner in Insolvency. The Insolvency Rules of 1905 have not the effect of taking away this right held to exist in O.S. Appeal 10 of 1888. Where the Commissioner in one Insolvency omits to consider documentary evidence of considerable importance, held, that the inquiry of the Commissioner cannot be deemed to be complete and that the case was one to be sent back to the Commissioner for considering such evidence. **Mangiah Chetty v. Ramiah Chetty**, 18 M.L.J. 565

WHITE, C.J., AND SANKARAN NAIR, J.

Vakil's Regulation (Travancore).

(1) *Power of Court to go behind agreement between vakil and client and fix reasonable remuneration.*

Under the Vakil's Regulation the Courts have power to go behind the agreement between a vakil and his client, and fix a reasonable amount as remuneration for professional services rendered by the vakil.

Such agreements are always watched with jealousy by Courts of justice.

The burden of proving the fairness of such agreement is always thrown on the party claiming under it. **Krishna Sastriyal Padmanabha Sastriyal v. Kochen Matheru**, 23 T.L.R. 41.

GOVINDA PILLAY AND MUTTUNAYAGOM PILLAY JJ.

References —20 T.L.R. 234; 29 C. 595, 12 A. 169, F., 13 T.L.R. 219, B.

Valuation of land.

See ACT I OF 1894 (LAND ACQUISITION).

Valuation of Suit.

(1) *Suit for possession of land—Definite portion of revenue paying Khata—Value for purposes of jurisdiction—Jurisdiction of Court to pass decree for pre-emption when the sum payable exceeds the Court's pecuniary jurisdiction.*

In a suit for the possession of land, where the subject-matter of the suit is a certain portion of a khata separately assessed to revenue, the value for the purpose of jurisdiction is 30 times such portion of the revenue of the part as may be rateably payable in respect of that part.

Valuation of Suit—(Continued).

A Court has no jurisdiction to pass a decree for pre-emption where the sum payable exceeds the limits of the Court's pecuniary jurisdiction.

(a). *Fata v. Khan Bahadur*, 46 P.R. 1908 = 94 P.W.R. 1908 = 172 P.L.R. 1908.

CLARK, C.J.

Reference:—(a) 16 P.R. 1908 (F.B.), F.

(2) *Possession of land by demolition of house thereon or on payment of compensation for it—Valuation of suit for purposes of jurisdiction—Civil Courts Act (Oudh), S. 17—*

The defendant held some land of the plaintiff on rent and built a house upon it disregarding the latter's notice to him to quit the land. The plaintiff sued for the demolition of the building and the restoration of the land to him. He went on to say that, if for any reason the Court could not order the demolition of the building, a decree might be passed in his favour for possession on payment of compensation for the building. The building was found to be worth more than rupees one thousand; and the Munsiff, in whose Court the suit was filed, held that the building was part of the subject-matter of the suit, within the meaning of S. 17 of the Oudh Civil Courts Act, and returned the plaint for presentation to the proper Court, on the ground that the value of the subject-matter of the suit exceeded Rs. 1,000.

Held, that the subject-matter of the suit was the value of the property which the plaintiff said he was entitled to take possession of (a), and that the case should be restored to the Munsiff's file and disposed of according to law. *Shaikh Nawab Ali v. Durga*, 11 O.C. 45.

CHAMBER, J.C.

References:—(a) 4 A. 320 and 23 M. 84, R.

(3) *Suit for declaration that sale of ancestral agricultural land would be void after alienor's death—Punjab Courts Act, S. 40 (b).*

For purposes of S. 40 (b) of the Act, the value of a suit for a declaration that a sale of ancestral agricultural land by a male proprietor would be void after the alienor's death, is the value of the land calculated at thirty times the land revenue, and not the amount of consideration for the sale. *Jalla v. Genna*, 60 P.R. 1907 (F.B.) = 76 P.W.R. 1907 = 79 P.L.R. 1908.

CHATTERJI, ROBERTSON AND RATTIGAN, JJ.

Reference:—145 P.R. 1902, *Apur*.

Valuation of Suit—(Continued).

(4) *Administration suit—Valuation—Computation of Court-fee—Valuation for purposes of jurisdiction—Court Fees Act, S. 7, IV (f)—Suits Valuation Act, S. 8—Lower Burma Courts Act, Ss. 2 (a), 25, 28.*

In an administration suit the Court-fee on the plaint should be computed *ad valorem* on the estimated value of the share claimed by the plaintiff, under S. 7, iv (f) of the Court Fees Act; the value for purposes of jurisdiction is the same, under S. 8 of the Suits Valuation Act, 1887.

The Court to which the appeal lies is determined by the value of the suit (i.e., the share claimed by the plaintiff) under S. 28 of the Lower Burma Courts Act, 1900. *Ma Ma v. Ma Hmon*, 4 L.B.R. 279.

IRWIN, O.C.J. AND ORMOND, J.

References:—17 C. 680, *Diss*; 18 B. 209, F; 7 B. 125; 7 B. 535, cited and F; 12 A. 506, R.

(5) Suit for possession of house valued by plaintiff at Rs. 90—Decree on payment to defendant of Rs. 634 and odd, value of improvements effected—Jurisdiction of District Judge to entertain appeal—Valuation of suit for purposes of Court fee and jurisdiction. See COURT FEES ACT, No. 7, 19 P.R. 1908.

(6) Suit by reversioner for declaration that a mortgage by widow will not affect his interest. See ACT XVIII OF 1884 (PUNJAB COURTS), No. 3, 42 P.R. 1907 = 100 P.W.R. 1907 = 66 P.L.R. 08.

(7) Declaratory suit by objector against decree-holder and judgment-debtor—Valuation of suit for purposes of jurisdiction and course of appeal—Civ. Pro. Code, Ss. 278, 283 and 617. See JURISDICTION (GENERAL), No. 1, 74 P.W.R. 1908.

(8) Suit for foreclosure of mortgage—Subject matter, valuation of—Jurisdiction. See MORTGAGE (FORECLOSURE), No. 4, 11 O.C. 154.

(9) Issue taken as to, in Munsiff's Court—No evidence adduced—Waiver—Interference by High Court in second appeal. See CIV. PRO. CODE, No. 259, 8 O.L.J. 266.

(10) Redemption suit. See ACT XVIII OF 1884 (PUNJAB COURTS). No. 3-a, 197 P.L.R. 1908.

(11) Suit for possession—Upon what basis should such suit be valued—Plaintiff's case.

Valuation of Suit—(Concluded).

not defendant's pleas, should be looked to. See ACT XVIII OF 1884 (PUNJAB COURTS), No. 3-b, 199 P.L.R. 1908.

Vendor and vendee

- (1) *Mortgage—Rights and position of vendee of a share in joint mortgaged property when it is redeemed in part or whole by his money*
—Amendment of plaint in further appeal.

Held, that when a vendee of a share in a joint property already mortgaged by all its owners redeems whole of it by his own money, he steps into the position of the original mortgagee, in respect of the shares of the other co-sharers, and acquires a charge thereon, and that the co-sharers have no right to take possession of their shares without paying, to the vendee their quota of the mortgage-money.

Practice Under the circumstances of this case, plaintiff was allowed to amend his plaint in further appeal. **Fazal Din v. Budha** 61 P.W.R. 1908.

CHATTERJEE AND JOHNSON, J.

- (2) *Vendor's lien for unpaid purchase money—Remedy when vendee has alienated the property for the discharge of vendor's hypothecation debt*—Damages—*Transcove Limitation Regulation, Art 132*.

Where plaintiff sues defendant for damages on the ground that the release deed executed by defendant as part of the consideration for the sale deed had become useless, and that there was thus a breach of an implied warranty of title, it was held that the plaintiff was entitled to succeed.

The acceptance of a collateral security by the vendor does not ipso facto extinguish the vendor's lien for unpaid purchase money, but the sale would be deemed to be extinguished if on the evidence, it be found that by the acceptance of the security it was intended to extinguish such lien. *Held*, also, that the suit was governed by art 132 of the Limitation Regulation. **Raman Govindan v. Sankaran Yalayudhan**, 23 T.L.R. 51.

SADASIVA AYYAR, C.J., AND HUNTER, J.

Reference—21 T.L.R. 151, R.

- (3) *Sale—Covenants by vendor*—*Pre-emption*—*Decree against purchaser in suit by pre-emptor*—*Vendee's right and vendor's liability*—“Digar dawedar.”

Vendor and vendee—(Concluded)

Where, shortly after the defendant sold to plaintiff a house purchased by herself recently, and covenanted for title and contracted that she would indemnify the plaintiff against any loss that might arise by reason of the bargain being annulled at the instance of any one, including a pre-emptor (a), a third person brought a suit for pre-emption against the original vendee and the parties to the present suit and obtained a decree for possession, *held*, that the plaintiff (purchaser) was entitled to recover from the vendor (defendant) the loss sustained in the transaction.

The words “*digar dawedar*,” in one of the clauses in the vendor's contract on which the vendee relied, being very wide, they included a person claiming property by right of pre-emption. **Khonmon Bibi v. Shah Mali**, 111 P.R. 1908.

RATTIGAN, J.

References (a) 61 P.R. 1881, 4 A. 337, D.

- (1) *Defendant a bona fide purchaser without notice of plaintiff's claim or means of ascertaining it*—*Defendant not taking any steps to search Registration office*—*Defendant cannot plead due diligence*.

The defence in this case was two fold. First the plaintiffs were put to strict proof of their title, secondly, a defendant said he was a bona fide purchaser without notice of plaintiff's claim or means of ascertaining it.

Held on the evidence that the plaintiffs had proved their purchase.

Held, also, on the evidence, that the defendant never took any steps to search the Registration office at all, and that, if he had done so, he would have found that his vendor was not the owner of the land, and that, therefore, he cannot be heard to say that he took reasonable steps to ascertain that his vendor had power to sell. **B Rungasawmy Naidu v. Maduray Pillay, Roy Bahadur**, 14 Bom. L.R. 337.

IRWIN, C.J., AND ORMOND, J.

- (5) *Right to haq-i-chaharum*—*Right of land lord to claim it from vendee*—*Wajib-ul ar. See Haq-i-chaharum* No. 1, 12 O.C. 61.

- (6) *See SALL.*

Village site

Right of Revenue authorities to grant portions of—*See GRAMA NATHAM*, No. 1, 4 M.L.T. 140.

Voluntary payment.

(1) Money paid by purchasers of mortgagees' rights in certain land for satisfaction of decree against mortgagee to prevent property from sale is—Whether recoverable by purchasers, where previous suit, under S. 283, C.P.C., declared purchase inoperative. See CONTRACT ACT, No. 24, A.W.N. (1908), 58.

(2) Husband's debts paid by wife in his lifetime—Payment is a—See HINDU LAW (DEBTS), No. 6, 5 A.L.J. 399.

Wagering contracts.

(1) Liability of principal to pay agent sums due on account of wagering contract—Contract Act, 1872, S. 30—

A cash payment by an agent on account of a simple *badni* transaction entered into on behalf of a principal is legally recoverable from the principal. So too, where enforceable liabilities are incurred by an agent on *badni* transaction, they are recoverable from the principal. By enforceable liability is meant a liability which the agent cannot resist or repudiate at law.

If an agent dealing *badni* for a principal loses a sum of money on the transaction and, having no previous account with the third party, authorises him to enter up in his books a debit against him (the agent), the agent, without paying the money, cannot recover the amount from his principal.

If in such a case, the agent already has dealings with the third party and is owed money by him on accounts with which the principal has no concern, and the sum lost as aforesaid being less than the sum due to the agent is settled by a credit in the agent's books and a debit in the third party's book, the amount so credited and debited is recoverable by the principal.

In a similar case if the debt owed to an agent is less than the sum lost by him on account of his principal and the matter is settled by a debit and credit as aforesaid, plus a payment in cash of the balance due by the agent, he can recover from his principal the amount adjusted by credit and debit and the amount of the cash payment.

If in such a case the sum already owed to the agent by the third party is equal to the sum lost as aforesaid to the third party, and the agent authorises that party to set off one against the other in his books and treat the account as squared, the agent can recover the

Wagering contracts—(Concluded).

sum in question from his principal. **Behari Lal v. Parbhu Lal**, 79 P.R. 1908 (F.B.)=130 P.W.R. 1908.

CLARK C.J., REID AND JOHNSTONE, JJ.

References —74 P.R. 1908, *overruled*; 18 P. R. 1895, 46 P.R. 1901; 23 A. 165; 8 Bom. H.C.R. 131, 29 C. 461; L.R. 4 Q.B.D. 685, 64 L.J.P. C. 62, L.R. 10 Q.B.D. 105, L.R. 13 Q.B.D. 779, R.

Wages.

(1) Suit for—Rate fixed by record of rights—Jurisdiction. See JURISDICTION (OF CIVIL AND REVENUE COURTS), No. 2, 41 P.R. 1908.

Waiver.

(1)—is a question of fact—Appeal to Privy Council—Ground not taken in the Appeal Court in India

A question of waiver was decided adversely to the Appellant by the Court of first instance and was not submitted for review to the Appeal Court in India,

held—that, the question being one of fact, the Judicial Committee had no power to entertain the appeal. **Dhanukdhari Singh v. Mahabir Pershad Singh**, 11 C.W.N. 799 (P.C.)=6 C.L.J. 11=9 Bom. L.R. 651=2 M.L.T. 193=17 M.L.J. 353=14 Bur. L.R. 1

LORD ROBERTSON, LORD COLLINS AND SIR ARTHUR WILSON

(2) Case where leave, under cl. 12 of Letters Patent, Calcutta, 1865, required before Court can entertain suit—Defendant on service of writ on him taking no step in the action except moving to set aside the service of writ on him—Defendant's action a waiver of objection by jurisdiction. See LETTERS PATENT (CALCUTTA), 1865, No. 1, 7 C.L.J. 441.

(3) Voluntary waiver of right to examine accounts—Settlement of accounts—Promissory note for amount found due—Right to re-open accounts. See ACCOUNTS, No. 2, 10 Bom. L.R. 281.

(4) Whether mortgagor's appearing to contest defective notice of foreclosure, issued to him under Reg. VII of 1806, and his offering to pay proper persons entitled amount to waiver of right to take advantage of legal defects of the notice in subsequent suit for redemption by him. See MORTGAGE (REDEMPTION), No. 8, 28 P.R. 1908

Waiver—(Concluded).

(5)—not made by pre-emptor of his right of pre-emption by simply receiving from vendee mortgage-money due to him on security of property. See *PRE-EMPTION*, No. 9, 39 P.L.R. 1908.

(6) Acceptance of rent after expiry of notice to quit, if waiver. See *LANDLORD AND TENANT*, No. 24, 12 C.W.N. 1059.

Wajib-ul-arz.

(1) *Construction of document—House tax—Cess—Rent.*

Under the *wajib-ul-arz* of a village, called Radhakund, the zemindar was declared to be entitled to one *taka* (six pies) per month for every house from the occupants of the village, and also from the owners of shops and temples. *Held*, that this payment (which was called "gharghanna") was not a house tax or cess, but merely ground rent and did not require special sanction *Balwant Singh v. Shankar*, A.W.N. (1908), 95=5 A.L.J. 361=30 A 235.

STANLEY, C.J., AND BURKITT, J.

(2) *Malguzars of manza Jawar in Nimar district—Suit to recover the site of a house in the abadi—Cl. IX of wajib-ul-arz—Transfer of right.*

The plaintiffs in this litigation are the *malguzars* of *manza Jawar* in the Nimar district and sued to recover the site of a house in the *abadi* on the ground that it had been sold by the original tenants in contravention of cl. IX of the *wajib-ul-arz*. They obtained a decree in the first Court but the claim was dismissed in appeal by the District Judge, who held that the *wajib-ul-arz* does not prohibit transfer of the right to occupy a site in the *abadi*. The *wajib-ul-arz* contains the following clause Every person is at liberty to sell or mortgage the materials of his house on leaving the village on any other occasion, but he cannot so dispose of his house-site, which belongs to the proprietors.

Held that the *wajib-ul-arz* relied on by the District Judge did not support his conclusion that the right to occupy may be transferred by sale. The case was remanded to the District Court with directions to re-admit the appeal and to determine it afresh on the merits. *Motiram v. Rup Khan*, 4 N.L.R. 155.

DRAKE-BROCKMAN, A.C.J.

References.—1 N.L.R. 93, D, 27 A. 338 and 27 A. 556, R.

Wajib-ul-arz—(Concluded).

(3) *Cl. 11 of the Nampur wajib-ul-arz—Construction—Transfer of right to occupy house built on village site—Origin and presumption as to occupancy.*

A right of occupancy by the person of the land of another cannot be assumed. The presumption is the other way. Occupancy is obtained by contract, by prescription, or by the force of statute.

Cl. 11 of the *wajib-ul-arz* precludes a transfer of the right to occupy a house built on the village site with the permission of the *malguzar*, and the *malguzar* can eject the transferee as a trespasser (a). *Govind Rao v. Amrit Rao*, 4 N.L.R. 149.

STANFORD, A.J.C.

Reference —(a) 1 N.L.R. 93, Diss.

(4) *Construction of special heading, viz., "Dastur darbab hay shafa," in relating to pre-emption—Whether such heading imports custom or contract.* See *PRE-EMPTION*, No. 23, A.W.N. (1908), 98.

(5) *Construction of—as to whether right of pre-emption embodied therein was one existing by custom or created by contract.* See *PRE-EMPTION*, No. 26, A.W.N. (1908), 121.

(6) , *construction of—Sharik-hakiat-Mahk—Owner of resumed muah—Preference over co-sharers in other khata.* See *PRE-EMPTION*, No. 27, 5 A.L.J. 302.

(7) *Construction of—Right of Hindu widow's brother to pre-empt in preference to co-sharers.* See *PRE-EMPTION*, No. 17, A.W.N. (1908), 59.

(8) *Evidentiary value of chakwal wajib-ul-arz—Conflict between earlier and later.* See *PRE-EMPTION*, No. 18, 44 P.R. 1907=82 P.L.R. 1908.

(9)—*entry in, by proprietors of mahals—No evidence of a custom of pre-emption prevailing in mahal.* See *PRE-EMPTION*, No. 7, 5 A.L.J. 79.

(10)—*recognising right of pre-emption on same price as paid by stranger—No right inter se among different classes of pre-emptors.* See *PRE-EMPTION*, No. 39, 5 A.L.J. 655.

(11) *Tenant's right to cut down trees—Consent of the landlord—Refusal of the consent, grounds for.* See *LANDLORD AND TENANT*, No. 20, 2 P.R. 1908 (Rev).

Warrant.

Whether warrant can be issued against a pleader who fails to appear in answer to a charge preferred against him under S. 14 of the Legal Practitioners' Act. See ACT XVII OF 1879 (LEGAL PRACTITIONERS), No. 5 3 M.L.T. 237.

Water.

Easements—Right to water whenever water was sold to the owner of the servient tenement by Government. See EASEMENTS ACT (V OF 1882), No. 1, 4 M.L.T. 414.

Water-rate.

Lease silent as to apportionment of any increase in—Rule to be followed. See LANDLORD AND TENANT, No. 29, 4 M.L.T. 460.

Widow Re-marriage.

(1) See ACT XV OF 1856.

(2) Alienation by widow—Effect of re-marriage—Legal necessity—Reversioner. See HINDU LAW (WIDOW), No. 18, 8 C.L.J. 542.

Wild animal.

—, elephant—Escape and re-capture—Property of original owner when ceases. See ANIMAL, No. 1, 12 C.W.N. 547.

Will.

(1) *Executed by Taluqdar—Construction of document—Threats and undue influence—Revocation of will—Application of provisions of the Indian Succession Act—Nudh Estates Act, Ss. 2 and 19—Succession Act, S. 57.*

Held, that a portion of a document may operate as a will although another portion may have nothing to do with the will.

Held, further, that the provisions of the Indian Succession Act which have been made applicable to the wills of Taluqdars and grantees apply to all the wills and codicils executed by them and not to any particular class of such wills and codicils. **Lachman Singh v Umrao Singh**, 11 O.C. 102 (B).

CHAMIER AND SANDERS, J. C.

(2) *Will of illiterate person—Proof of knowledge of contents of will purporting to bear the mark of illiterate testator.*

Those who propound the will of a person who can neither read nor write must prove affirmatively that the testator knew and approved of the contents of the will. In the case of an illiterate person something more is required than proof that the executor made his mark on the

Will—(Continued)

document. Knowledge of the contents of the document cannot be inferred from the fact that he marked the document. **Ram Prasad v. Jokhu**, 11 O.C. 20.

CHAMIER, J. C.

Reference :—1 C.L.J. 109, *It.*

(3) *Will by widow with consent of reversioner—Validity—Act VIII of 1827, certificate of heirship under—Effect.*

Where a will is made by a Hindu widow with the consent of her next reversioner—the only relation interested in disputing the same—such a will is valid and binding.

Where the provisions of the Indian Succession Act are not applicable to a will, the Courts need not concern itself with the question whether the written will is duly signed by the testatrix and attested, but with the question whether the document contains the formal expression of the wishes of the testatrix as to the disposal of her property after her death; and whether it was made at a time when she was in her senses.

A certificate of heirship under Act VIII of 1827 confers no further rights on the grantee of the same than to permit debtors to pay their debts, and others who have the possession of the estate to give up the possession to the grantee, to relieve themselves of further liabilities. It does not enable the grantee to give a good title to a stranger in respect of property over which he is not given any power of disposition by the Will. **Jiwanmal, son of Jethmal v Nihalchand Hiranand**, 1 Sind L.R. 196.

PRATT AND CROUCH, J.

(4) *Due execution of.*

Where a will purporting to be signed by the testator and seven witnesses, of whom four were stated to be respectable, was produced within three days after the testator's death, and there were several circumstances corroborating the evidence given by the four witnesses, and where the weight to be given to the other evidence in the case was not shaken by the topics put forth on appeal

Held, that there was due execution of the will, though the plaintiff and the other three witnesses were not examined, and though the evidence referred to was liable to suspicion and to the comments made on it in the Court below.

Will—(Continued).

Mussamat Chanda Dei v. Madho Sara, 14 Bur. L.R. 2 (P.C.).

LORDS ASHBOURNE, MACNAGHTEN, ATKINSON AND SIR ARTHUR WILSON.

(5) *Construction—Meaning of* "Bapika Vanshamanthi."

The testator gave by his will a power to his widow to adopt a son to him from a class described as "*Mara Bapika Vanshamanthi*."

Held, on a construction of the expression, that it meant "from amongst my paternal agnates," and not "from amongst the descendants of my father." **Dayabhai Tapidas v. Chunilal Hurgowandas**, 10 Bom. L.R. 97.

JENKINS, C.J., CHANDAVARKAR AND HEATON, JJ.

(6) *Bequest with private instructions giving pecuniary legacies to certain parties and bulk of property to Church—Private instructions of testator suppressed by legatee-appellant—Validity of will—Trusts Act, S. 5, proviso to Ss. 5, 81 and 83—Applicability of S. 81—Applicability of English Law—Effect of such will—Fraud—Estoppel—Contract—Letters of Administration right to.*

Petition for grant of Letters of Administration of estate of a Roman Catholic priest, with the will annexed by which the petitioner was made residuary legatee. A caveat was put in by one of the next-of-kin, alleging in effect that the testator had bequeathed the estate to the petitioner, subject to certain instructions as to how the property should be disposed of, and that the petitioner had fraudulently suppressed the private instructions left by the testator in order to claim the estate for himself. It was found that the will did not really express the intentions of the testator, as the plaintiff undertook to dispose of the property in other ways, explained to him by the testator, and that the petitioner was aware, from the first, of the testator's intention that the property should be disposed of according to the testator's instructions.

Held, that, if an individual on his death-bed, or at any other time, is persuaded by his heir-at-law, or his next-of-kin, to abstain from making a will, or if the same individual, having made a will, communicates the disposition to the person on the face of the will benefited by that disposition, but at the same time, says to that individual that he has a purpose to answer

Will—(Continued).

which he has not expressed in the will, but which he relies on the donee to carry into effect and the donee assents to it either expressly or by any mode of action which the donee knows must give the testator the impression and belief that he fully assents to the request, then undoubtedly, the heir-at-law in the one case, and the donee in the other, will be converted into trustees simply on the ground that an individual shall not be benefited by his own personal fraud (*a*).

The proviso to S. 5 of the Indian Trusts Act which embodies the English equitable rule makes the English Law applicable to India (*b*).

Per WALLIS, J. The present case does not come within the provisions of S. 81 of the Trusts Act and on the other hand, there is statutory authority in the Act for applying the principles laid down in the English cases.

Per CURHAM.—When a legatee or trustee claims as universal legatee, and suppresses the secret instructions given by the testator without stating what they are, with the evident intention of retaining the estate himself, it is clear that the Letters of Administration would enable him to commit fraud, and, therefore, ought not to be granted.

Per SANKARAN NAIR, J.—S. 81 of the Trusts Act applies even if the testator intending to dispose of the beneficial interest to others leaves his estate to the devisee. The words "intended to dispose of the beneficial interest therein" in S. 81 have reference to the disposal of the beneficial interest by the transfer or will.

In England, evidence appears to be admissible only to prove a trust, but not to prove that the legal estate alone passed. In India, once the evidence is admitted and it is proved that the devise is only a trustee, he takes no beneficial interest in the property, but holds it only for the benefit of the testator's legal representative (*c*), but under the English Law, he holds it absolutely except where knowledge of the testator's wishes and a fraudulent intention on the part of the devisee, or except where an admission by him that he holds merely as trustee, is shown.

Obiter.—Under the Indian Trusts Act, the beneficiary has no estate or interest in the subject-matter of the trust, he has only a right to proceed against the trustee.

Per SANKARAN NAIR, J. (WALLIS, J., dissenting), S. 187 of the Indian Succession Act is no bar to a claim by a beneficiary against a legatee,

Will—(Continued).

entitled as universal legatee to Letters of Administration to enforce the trust, which a testator has created by giving secret instructions not embodied in the will.

Per SANKARAN NAIR, J.—Though the title of an administrator does not come into existence until the grant of administration, when granted, it relates back to the time of the death of the testator, and where the act is done by a party who afterwards becomes administrator for the benefit of the estate or to fulfil the wishes of the testator, the relation back subsists and the act is valid. Where a person is both an executor *de son tort* and the universal legatee, he has all the liabilities that belong to the character of executor and universal legatee and cannot plead his omission to obtain Letters of Administration against a beneficiary seeking to enforce the trusts that the legatee is bound to discharge.

Per WALLIS, J.—A legacy cannot be recovered without administration of the testator's estate, and, where there has been no grant of probate or Letters of Administration, a suit by a beneficiary to enforce the trusts fails (*d*). **Louis Kunha v. Coelho and Louis Kunha v. Souza**, 18 M.L.J. 158—81 M. 187.

WALLIS AND SANKARAN NAIR, JJ.

References.—(a) 4 E and L.A. p. 82 (97), F. (b) 30 C. 788; 22 A. 149 (P.C.), 29 M. 336 (F.B.), R.; 15 M. 424, R; 2 K and J. 330 26 Ch. D. 531, 4 L.R.H.L. 82 (88), 3 Ch. p. 362, 1 Ch. 403, 2 Ch 220, 1 H.L. 198; 5 Vin. A.B.R. 521, 30 C. 788, R. (c) 3 M. and G. 557. (d) L.R. 17 Eq. 20, R.

(7) *Will, document whether a—Construction—Operation after death—Revocability.*

A document which contains directions regarding the executant's property after his death, which in certain circumstances may be revoked is a will.

Instruments not drawn by professional men should be liberally construed.

The document in question in this case would be ineffective as an instrument of transfer of immoveable properties owing to the properties not being specified in it, but could be given effect to if it were a will.

Held—that the document was a will **Ram Moni Das, v. Ram Gopal Shaha**, 12 C.W.N. 942.

MITHA AND CASPERAZ, JJ.

Will—(Continued).

(8) *Construction of document—"Money"—General personal estate.*

Where a testator after clearly indicating an intention to exclude entirely certain of his relations from succession to his property, proceeded to bequeath his "money" to two legatees, with directions as to its disposal, it was held that the intention of the testator being apparently, from a perusal of the whole will, to bequeath all his personal property to the legatees, it was not necessary to construe the term used in its strict limited signification, but the whole of the testator's personal estate passed. **Cheda Lal v. Gobind Ram**, A.W.N. (1908) 205=5 A.L.J. 519.

STANLEY, C.J. AND BURKITT, J.

Reference—25 Ch. D. 154, R.

(9) *Construction of—*

In construing a will, the test to be applied is—What did the testator mean having regard to the words he used? In applying this test, effect must be given to the principle that "technical words of known legal import must have their own legal effect, even though the testator uses inconsistent words, unless they are of such a nature as to make it perfectly clear that the testator did not mean to use the technical terms in their proper sense."

Where there has been a devise or bequest of all a man's property, the generality of the disposition cannot be cut down, unless the intention that it should be so cut down is clear.

A will contained the following clauses—cl. 1. —I will and bequeath to my dear wife Anne in trust and for her maintenance and support during her life all the money, property, goods and chattels of which I may die possessed, whatever and wheresoever situated, and I appoint my dear wife Anne sole administratrix of this, my last will and testament. Cl. 10 —I further will that my dear wife Anne, as sole executrix of this my last will and testament shall draw from current deposit accounts, whether here or in Great Britain, such sum or sums of money as she may require for her maintenance and for the working and maintenance of my property; and that she shall receive and dispose of all processes, rents and profits from the said property as to her may seem best in the interests of the property; and I empower her to sell all or any part of the property at any time when it may appear to her that a favourable opportunity occurs.

Will—(Continued).

Held, that the will conferred a life estate on the wife and that the testator did not intend to use words "in trust" in cl. 1 in their technical sense. Even if the words "in trust" were given their legal effect, he intended the trust for the benefit of his wife only. *Held*, further, that the words "for her maintenance and support" were words of description or motive, and would in no way cut down the estate "during her life" which the testator in terms gave to his wife. **Mary Harriett Anne Wilson v. George Oakes**, 18 M.L.J. 331=31 M. 283=4 M.L.T. 295.

WHITE, C.J. AND MILLER, J.

Reference —(a) 24 C. 834 (P.C.), R.

(10) *Construction—Persona designata—Reason and motive of gift—Adopted son—Description.*

Where a Hindu testator bequeathed his property to "Lalta Prasad my adopted son," *held*, in the absence of anything in the will to show that the fact of the adoption of the devisee was the motive or the reason for the gift, that the language of the gift was to be interpreted in its ordinary meaning as a gift to Lalta Prasad as a *persona designata*, who was entitled to take under it even though the adoption was not proved (a). **Lalta Prasad v. Salig Ram**, 5 A.L.J. 626=A.W.N. (1908), 249=4 M.L.T. 442.

STANLEY, C.J., AND BANERJI, J.

Reference —(a) 3 I.A. 253=26 W.R. 91, F.

(11) *Will, construction of—Intention—Inappropriate words—"Cash"—Mortgage bonds—Money.*

In construing a will, what the Court is concerned with is to ascertain the intention of the testator, and if it finds that he intended that all his moveable property should pass to the legatee, it should not hesitate to carry out the testator's intention, even though he used an inappropriate word such as "cash."

No absolute technical meaning should be given to such a word as "money." **Parsanni v. Ghareeb Das**, 5 A.L.J. 708.

STANLEY, C.J. AND BANERJI, J.

References —25 Ch. D. 154; 5 A.L.J. 519, R.

(12) *Legacy, specific or demonstrative—Particular fund not legally chargeable with payment—Demonstrative legacy, non-ademption of—Ss. 137, 140, Succession Act, 1865.*

Will—(Continued).

Demonstrative legacies will not fail, if the particular fund, though in existence, cannot, by reason of some provision of law of which the testator was apparently in ignorance, be charged with the payment of the legacy in question (a).

Where the hereditary *jagirs* of a testator were bequeathed to his surviving son, with a direction that out of the income of the said *jagirs*, his predeceased son's adopted son should receive a certain sum every year from the legatee, *held*, in the circumstances of the case, that the annuity was a "demonstrative legacy" within the meaning of Ss. 137, 140 of Act X of 1865. **Bhagwan Das v. Ram Das**, 109 I.R. 1908.

CLARK, C.J. AND RATTIGAN, J.

Reference —(a) 9 H.L. Cas. 885, R.

(13) *Will—Revocation of—Registered will not found after death of testator—Evidence—Secondary evidence—Burden of proof.*

The plaintiff, a minor, claiming under a registered will of his grandfather, sued to set aside an alienation by his father of property included in the will. The original will was not forthcoming. A question arose whether a certified copy of the will was admissible in evidence.

Held, that as, under the circumstance from the mere fact that the will was not forthcoming, it could not be presumed that the will was revoked by the testator, the certified copy of the will was admissible in evidence. **Puran v. Toni**, 204 P.L.R. 1908.

RATTIGAN, J.

(14) One of several executors of will applying for revocation of probate, long ago granted, of will on ground of its forgery—Such executor entitled to have his name, as executor, struck out of probate—Such executor has no *locus standi* to challenge will. See **PROHATE**, No. 2, 12 C.W.N. 573.

(15) Appointment of receiver in testamentary suit—Validity of will for *dharma*rit. See **RECEIVER**, No. 1, 39 P.R. 1908.

(16) Right of hereditary shebait to bequeath his office by. See **RELIGIOUS ENDOWMENTS**, No. 2, 12 C.W.N. 323.

(17) Grant of Letters of Administration—Its revocation as regards a portion of the property of the deceased on the ground of an oral will. See **ACT V OF 1881, (PROHATE AND ADMINISTRATION)**, No. 6, 8 P.W.R. 1908.

Will—(Concluded).

(18) Construction of wills—Bequest to "daughters and their respective sons"—Restriction of descent to male issues—Absolute or life-estate—Woman's estate—Survivorship among daughters—Spiritual benefit—Reminder over to sons—Gift over to daughters on failure of adoption. See HINDI LAW (WILLS), No. 2 12 C.W.N. 729 (P.C.).

(19) Condition in, that adopted son should take after widow if of good character—Contingent interest—whether void for uncertainty—whether person adopting bound not to make a will See HINDI LAW (ADOPTION), No. 1, 12 C.W.N. 668.

Winding up order.

Effect of—where expenditure, incurred by agent before such order, comes within S. 221, Contract Act. See CONTRACT ACT No. 36, 3 M. L.T. 247.

Withdrawal of appeal

On—, limitation for execution of decree begins to run from date of original decree, and not from date on which Appellate Court accepted withdrawal and closed the matter—Limitation for execution of original decree. See LIMITATION ACT, No. 190 87 P.L.R. 1908.

Withdrawal of insolvency petition.

Effect of—on vesting order—Whether such petition is legally equivalent to dismissal by consent. See INSOLVENCY ACT (S. 11 and 12) (V.C. 40), No. 1, 10 Bom. L.R. 178.

Withdrawal of suit.

(1) *Suit for partition by co-shares—Alienors of other co-shares made parties to the suit—Subsequent suit by an alienor—Maintainability of suit—Leave to withdraw suit with liberty to file a fresh suit*

One of several Mahomedan co-shares brought a suit for a general partition of property, in which they impleaded the alienors of some of the other co-shares as defendants. It was held in that suit, that it was unnecessary to enquire into the rights of the alienors, and that they should be directed to a separate suit for their remedy.

Afterwards, one of the alienors brought a suit for a share in the specific property sold to him, making the co-shares parties to the suit, but not impleading the other alienors.

It was held (1) that the suit was not maintainable in the form in which it was brought, and,

Withdrawal of suit—(Concluded).

(2) that the plaintiff may be allowed permission to withdraw the suit, with permission to file a fresh suit for the same subject-matter of the litigation. *Pir Mian Nuralh wd. Pir Arshad Shah v. Mussumat Arbab Khata* 1 Sind L.R. 187.

PRATT AND CROUCH, JJ.

References —11 B.H.C.R. 72 and 77. and 23 B. 385, followed.

(2) Leave under cl. 12 of the Charter to institute suit granted by Registrar—Order giving leave to withdraw such suit and file fresh suit *ultra vires*—Order one directing plaint to be returned to plaintiff—Limitation. See CIV. PROC. CODE, No. 234, 12 C.W.N. 921.

Witnesses.

Examination of witnesses—Burden of proof on defendant—Defendant deliberately closing his case without examining a witness whom both sides had summoned—Defendant applying after close of case for leave to examine such witness—Application to be refused. See CIV. PROC. CODE, No. 103 1 N.I. R. 129.

Worship

(1) Right of exclusive worship—Admitting new worshippers contrary to usage—Breach of trust—See HINDI TEMPLE No. 1, 12 C.W.N. 946.

(2) Exclusive right of—Whether right of worship may be restricted to a class, when founded for a community—See MAHOMEDAN LAW (WAKF) No. 4, 13 C.W.N. 26.

Written statement

—of defendant claiming set-off—Whether requires *ad valorem* Court fee. See COURT FEE, No. 1, 30 P.W.R. 1908.

Zaildari.

(1) *Claim of a candidate of the prevailing tribe in a zail—Superior right.*

Held that a person who belongs to a prevailing tribe in a zail and is also otherwise fit to act as a zaildar should be given preference over other candidates for the post. *Jafar Khan v. Raja Azimullah Khan* 2 P.W.E. 1907 (Rev.)=43 P.L.R. 1908.

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(2) Appointment made on appeal by the Commissioner, when to be interfered with by Financial Commissioner. See ACT XVII OF 1887 (PUNJAB LAND REVENUE), No. 3, 1 P.R. 1908 (Rev.).

Zerai land.

Evidence—Admission of tenant—See ACT VIII OF 1885 (BENGAL TENANCY) No. 23-a, 18 C.W.N. 135.

